Supreme Court, U.S.
FILED
08-507 JUL 7 - 2008
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD SHARIF, ET AL.,

Petitioners,

vs.

WELLNESS INTERNATIONAL NETWORK, LTD., WIN NETWORK, INC., ET AL.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings in this case, as to call for an exercise of this Court's supervisory power.

2. Whether this case presents an issue of first impression because the question of whether a district court may enforce a local rule in a manner which causes a party to lose rights contrary to the savings clause provided under Federal Rule of Civil procedure 83(a)(2) has never been squarely addressed by this Court.

PARTIES INVOLVED

All parties who have an interest in the outcome of this case do not appear or the caption of the case on the cover. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follow:

1. The Petitioners are: Richard Sharif, Waqar Khan, Shafqut Khan, Abdul Rashid and Shaheen Rashid.

2. The Respondents are: Wellness International Network, Ltd., Win Network, Inc., Ralph Oats and Cathy Oats.

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PETITION FOR WRIT OF CERTIORARI

Richard Sharif, Waqar Khan, Shafqut Khan, Abdul Rashid and Shaheen Rashid, hereinafter referred to as ("Petitioners") pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Northern District of Texas affirming the district court's judgment granting Respondents summary judgment which is predicated upon Petitioners' trial counsel's technical non-compliance with Local Rule 7.1(b)(1) of the United States District Court for the Northern District of Texas.

JUDGMENT AND OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is set out in the Appendix at A, and is unreported.

JURISDICTIONAL STATEMENT

Petitioners invoked the jurisdiction of the United States District Court for the Northern District of Texas pursuant to 28 U.S.C. § 1332 on the grounds complete diversity of citizenship existed between the parties and on the grounds the amount in controversy exceeded $75.000. Petitioners also invoked the district court's jurisdiction pursuant to 28 U.S.C. § 1331 and 18 U.S.C. §§ 1964, 1965 on the grounds Petitioners asserted a Civil Rico cause of action in their complaint. Additionally, under 28 U.S.C. § 1367 the district court had supplemental jurisdiction over Petitioners' state law claims. A final judgment was entered by the district court on July 17, 2007.

On July 23, 2007, Petitioners filed their notice of appeal in accordance with Rule 4(b) of the Federal Rules of Civil Procedure, thereby invoking the jurisdiction of the United States Court of Appeals for the Fifth Circuit pursuant to 28 U.S.C. § 1291. The Fifth Circuit Court of Appeals entered judgment on April 8, 2008.

Petitioners now invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. Federal Rule of Civil Procedure 83(a)(2) which states that a local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a non-willful failure to comply with the requirement.

II. Local Rule 7.1(b)(1) of the United States District Court for the Northern District of Texas which requires a Certificate of Conference to be attached to a motion if a motion is opposed by a party.

III. Federal Rule of Civil Procedure 36(a)(3), which provides that a matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney.

IV. The Seventh Amendment of the United States Constitution which guarantees a litigant the right to a trial by jury.

STATEMENT OF THE CASE

In April of 2002, Petitioners who are all former independent distributors of Wellness International products, brought suit in the United States District Court for the Northern District of Illinois – Eastern Division, against Wellness International Network LTD, a Texas Corporation, a/k/a WIN and several of its corporate officers and individual affiliates alleging that the WIN distributorships for which they paid substantial sums (in varying amounts up to in excess of $400,000) were in fact part of an illegal pyramid scheme and fraudulent. The suit sought declaratory judgment and injunctive relief declaring the distributorship contracts void and prohibiting their enforcement against Petitioners, and seeking damages (trebled under RICO), punitive damages and attorneys' fees and costs. More specifically, the suit alleged violations of the RICO statute, the federal securities law, the Illinois Consumer Fraud Act and the common law, as well as violations of the criminal law giving rise to an alleged right to void the distributorship contracts as being against public policy.

Said lawsuit ultimately resulted in the Seventh Circuit Court of Appeals issuing a published opinion entitled **Sharif, et al., v. Wellness, et al.**, 438 F.3d 759 (7th Cir. 2006).[1] The opinion reveals, the 7th Circuit vacated the district court's decision to dismiss Petitioners' lawsuit for lack of prosecution and also reversed the district court's denial of WIN's motion to compel arbitration.

On July 8, 2005, while the above mentioned appeal was pending before the 7th Circuit Court of Appeals, Petitioners filed a lawsuit in the Northern District of Texas naming Wellness International Network, LTD., its general partner WIN and three of its principles, Ralph

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[1] A copy of the Seventh Circuit's published opinion is included in the Appendix at B.

Oats, Cathy Oats and Sheri Matthews as Defendants. In their lawsuit, Petitioners alleged that the Defendants operated an illegal pyramid scheme disguised as a multi-level marketing operation which sold and distributed health and wellness products.

More specifically, the Complaint alleged violations of the Racketeer Influenced and Corruption Act ("RICO"), common law and fraud claims, and violations of the Texas Deceptive Practices Act ("DTPA"), which resulted in the Petitioners suffering combined financial injuries in the amount of approximately $995,000.00 at the hands of the Defendants.

Shortly after filing their lawsuit in the Northern District of Texas, Petitioners filed an unopposed motion to stay all proceedings pending a decision by the Seventh Circuit Court of Appeals related to their lawsuit filed in the Northern District of Illinois. On December 29, 2005, the district court for the Northern District of Texas entered an order staying all proceedings and the case was administratively closed.

Subsequently, on February 17, 2006, the Seventh Circuit rendered its decision related to Petitioners' lawsuit filed in the Northern District of Illinois and an order was entered by the district court in the Northern District of Texas lifting the stay of July 27, 2006. A trial scheduling order was entered by the district court for the Northern District of Texas on August 22, 2006. Said order also required the Parties to inform the district court of their choice of an agree-upon mediator and directed the Parties to mediate the case if possible by December 22, 2006.

On September 15, 2006, the undersigned filed an application to appear pro hac vice in the United States District Court for the Northern District of Texas on behalf of all of the Petitioners due to their prior Chicago attorney, Robert Plotkin becoming extremely ill. Sixty-eight days later on November 22, 2006, Respondents' attorneys served one set of 291 requests for admissions upon Petitioner Richard Sharif, one set of 238 requests for

admissions upon Richard Sharif's mother Soad Wattar and his sisters Hafi Kaj and Ragda Shariefh, one set of 220 requests for admissions upon Petitioners Abdul Rashid and Shaheen Rashid and one set of 228 requests for admissions upon Petitioners Waqar Khan and Shafqut Khan along with their requests for other discovery materials.

On December 20, 2006, when it became apparent to the undersigned that it would be impossible to answer all of the Respondents' requests for admissions by December 22, 2006, the undersigned electronically filed a motion seeking an extension of time to comply with Respondents' requests for Rule 36 Admissions and other requests for discovery materials. Additionally, on said date, the undersigned simultaneously filed a motion seeking an extension of the mediation deadline date after being unable to agree with the Respondents' attorney about the person who would mediate this matter.

Subsequently, on January 5, 2007, the district court entered an order directing the clerk to unfile the Petitioners' motion for an extension of time to comply with Respondents' requests for admissions and other discovery materials, because, Petitioners' motion did not contain a separate certificate of conference as required under N.D. TEXAS LOCAL RULE 7.1(b)(1). [2] However, the district court **did not** enter an order directing the clerk to unfile Petitioners' motion for an extension of time of the mediation deadline date, even though, said motion did not contain a separate certificate of conference as required by N.D.TEXAS LOCAL RULE 7.1(B)(1). On January 9, 2007, the undersigned filed a Renewed Motion for an

[2] Although, Petitioners' motion for an extension of time did not contain a separate certificate of conference attached to said motion as required under N.D. Texas Local Rule 7.1(b)(1). Nevertheless, said motion advised the district court in the body of the 3-page motion that the parties had conferred and that the Respondents were opposing said motion.

Extension of Time to Comply With Respondents' Requests for Admissions and Other Discovery Materials, and again failed to include a separate certificate of conference as required under N.D. TEXAS L.R. 7.1(b)(1) but again advised the district court in the body of the three-page motion that he had conferred with Respondents' counsel who was opposed to the district court granting Petitioners' motion for an extension of time to comply with Respondents' requests for admissions and other discovery materials. Consequently, because the Renewed Motion did not contain a separate certificate of conference, the district court ordered the clerk to unfile the Renewed Motion on January 11, 2007.

Subsequently, Respondents took the position that all of their Requests for Admissions served upon Petitioners were deemed admitted as a matter of law under Fed.R.Civ.P. 36(a)(3). On March 22, 2007, the undersigned filed a Motion to Vacate Alleged Defaulted Admissions. Said motion was referred to a magistrate judge and after the matter was fully briefed, the magistrate judge entered an order denying Petitioners' Motion To Vacate Alleged Defaulted Admissions on April 12, 2007.

On April 22, 2007, Petitioners filed an Objection to the Magistrate Judge's ruling on their Motion to Vacate Alleged Defaulted Admissions, to which Respondents filed a response on May 2, 2007. The district court overruled Petitioners' Objections on May 7, 2007, ruling that Petitioners failed to show that the Magistrate Judge's ruling was clearly erroneous or contrary to law.

On May 21, 2007, Petitioners filed a Motion For Reconsideration of the Court's Order of May 7, 2007, wherein the Court overruled their Objections to the Magistrate Judge's ruling on their Motion to Vacate Alleged Defaulted Admissions. Respondents filed a response on May 25, 2007. The district court denied Petitioners' Motion for Reconsideration on May 31, 2007.

On May 24, 2007, Petitioners filed a First Amended

Complaint, asserting two causes of action: (1) violation of the Texas Deceptive Trade Practice Act (DTPA), and (2) "RICO claims," asserting violations of 18 U.S.C. §§ 1962 (a)-(c). Respondents filed a Partial Motion to Dismiss the First Amended Complaint, for failure to comply with Rule 9(b) and failure to state a claim under Rule 12(b)(6).

On June 11, 2007, Respondents also filed a Motion for Summary Judgment on all remaining claims on four grounds: (1) Petitioners' deemed admissions either negated the existence of a material element on each of Petitioners' claims, or established that there was no evidence to support one or more essential elements on each of Petitioners claims; (2) limitations barred all of Petitioners' claims; (3) Respondents asserted a no evidence motion for summary judgment, as no evidence existed to support any of Petitioners' claims; and (4) Petitioners' failure to serve Initial Rule 26 Disclosures precluded them from introducing any evidence of witnesses at trial, pursuant to FED.R.CIV.P. 37(c)(1).

On July 3, 2007, Petitioners filed their Response to Respondents' Motion for Summary Judgment and stated that "because the Court already denied two motions brought by the Plaintiffs [Petitioners] seeking to withdraw the deemed admissions, it is impossible for the Plaintiffs to overcome Defendants' [Respondents'] motion for summary judgment based upon the defaulted admissions being deemed admitted."

On July 16, 2007, the district court granted Respondents' Motion for Summary Judgment on all claims, predicated upon the following two grounds: (1) that the deemed admissions negated the existence of a material element on each of Petitioners' claims; and (2) Petitioners' failed to point to any evidence that would support a finding in their favor at trial. However, the district court did not address Respondents' claims related to the limitations and Rule 37(c)(1) issues, and denied all other pending motions as moot. Final judgment was

entered on July 17, 2007. [3]

Petitioners timely filed a Notice of Appeal on July 23, 2007. However, on September 21, 2007, the Clerk of the Court of Appeals for the Fifth Circuit entered an order dismissing the appeal pursuant to Local Rule 42 predicated upon Petitioners' failure to order transcripts and make financial arrangements with the court reporter. Petitioners filed an unopposed motion seeking to reinstate the appeal on the grounds that transcripts were not necessary to decide the issues which would be raised on appeal. On September 29, the Clerk entered an order granting Petitioners' unopposed motion to reinstate the appeal.

Petitioners argued on appeal that: (1) the district court had abused its discretion when the district court entered an order directing the clerk to unfile both of Petitioners' motions seeking an extension of time to comply with the Respondents' Requests for Admissions and Other Discovery Materials based upon a technical violation of N.D. TEXAS LOCAL RULE 7.1(b)(1) and (2) the district court's abuse of its discretion ultimately resulted in Respondents' Requests for Admissions being deemed admitted under FED.R.CIV.P. 36(a)(3) wrongfully provided Respondents with grounds to obtain summary judgment in their favor.

On April 8, 2008, the United States Court of Appeals for the Fifth Circuit affirmed the district court's decisions in a brief unpublished opinion condemning Petitioners' lawsuit. Said opinion shows the panel had threatened Petitioners with sanctions if they decided to pursue this matter any further in the Court of Appeals for the Fifth Circuit.

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3. ***Sharif v. Wellness Int'l Network, Ltd,*** No, 07-10834, 2008 U.S. Appx. LEXIS 7483, at *2, ___ Fed. Appx. ____ (5th Cir. April 28, 2008) (not for publication).

"After this appeal was dismissed for Appellants' failure to order a transcript timely and make financial arrangements with the court reporter, it was reinstated on September 26, 2007, leaving pending in the district court Appellees' motions for at least $425,000 attorney fees pursuant to Fed.R.Civ.P.54(d)(2). A review of the record on appeal demonstrates that Appellees' untimely performance in this court mirrors a lengthy history in the district court of dilatoriness and hollow posturing interspersed with period of non-performance and compliance by Appellants and their counsel, leaving the unmistakable impression that they have no purpose other than to prolong this contumacious litigation for purposes of harassment or delay, or both. The time is long overdue to terminate Appellants' feckless litigation at the obvious cost of time and money to the Defendants by affirming all rulings of the district court but remanding the case to that court for the reinstatement of its consideration of Appellees' motion for attorney's fees. In so doing, we caution Appellants that any further efforts to prolong or continue proceedings in this court, including the filing of petitions for rehearing, will potentially expose them to the full panoply of penalties, sanctions, damages and double costs pursuant to FRAP 38 at our disposal. AFFIRMED; REMANDED FOR RULING AND DETERMINATION OF APPELLEES' MOTION FOR ATTORNEY FEES."

(See copy of the opinion set forth in the Appendix at A.)

REASONS FOR GRANTING CERTIORARI

1.

The United States Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings in this case, as to call for an exercise of this Court's supervisory power.

I. The District Court's Rule Making Authority

The authority of the United States District Courts to adopt or promulgate rules emanates from three sources. First, Congress has vested this Court with the authority to prescribe rules of practice and procedure for the federal courts. 28 U.S.C. § 2072(a). Pursuant to that authority, this Court has adopted Federal Rule of Criminal Procedure 57 ("Rule 57"), which provides that each district court may from time to time make or amend rules governing its practice, provided the rules are consistent with the Federal Rules of Criminal Procedure. *See also* Fed.R.Civ.P. 83 (civil analogue). Second, Congress has vested federal district and circuit courts with the independent authority to prescribe local rules of practice consistent with Acts of Congress and the rules of practice and promulgated by this Court. 28 U.S.C. § 2071(a). Finally, this Court has long recognized that district courts have certain inherent rule-making powers arising from the nature of the judicial process. ***See* Chambers v. NASCO, Inc.**, 501 U.S. 32, 43, 111 S.Ct. 2123, 2132, 115 L.Ed.2d 27 (1991); **Link v. Wabash Railroad Co.**, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962); **United States v. Hudson**, 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812) ("Certain implied powers must necessarily result to our Court of jurisdiction from the nature of their institution.").

Consistent with these principles, this Court has upheld

the authority of district courts to promulgate local rules unless 1) the rule conflicts with an Act of Congress; 2) the rule conflicts with the Federal Rules of Criminal Procedure; 3) the rule is constitutionally infirm; or 4) the subject matter governed by the law is not within the power of the district courts to regulate. ***See*** **Frazier v. Heebe,** 482 U.S. 641, 654, 107 S.Ct. 2607, 2616, 96 L.Ed. 2d 557 (1986); (Rhenquist, C.J., dissenting) (citing **Colgrove v. Battin,** 413 U.S. 149, 159-60, 162-64, 93 S.Ct. 2448, 2454, 2455-57 (1973); **Miner v. Atlas,** 363 U.S. 641, 651-52, 80 S.Ct. 1300, 1306-07, 4 L.Ed.2d 1462 (1960); **Story v. Livingston**, 38 U.S. (13 Pet.) 359, 368, 10 L.Ed. 200 (1839)). In addition, this Court has struck down a local rule which it deemed "unnecessary and irrational." *Id.* at 646 (majority opinion). It follows that Local Rules are presumptively valid unless they contravene one of the five principles mentioned above.

II. The Fifth Circuit Court of Appeals has condoned the district court's enforcement of N.D. TEXAS Local Rule 7.1(B)(1) in a manner which is prohibited by Federal Rule of Civil Procedure 83(a)(2).

Federal Rule of Civil Procedure 83(a)(2) states in pertinent part:

"A local rule imposing a requirement or form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement."

The advisory committee notes regarding Fed.R.Civ.P. 83(a)(2) states in pertinent part:

"Its aim is to protect against loss of rights in the enforcement of local rules relating to matters of form. For

example, a party should not be deprived of a right to a jury because its attorney, ***unaware of - - or forgetting*** - - a local rule directing that jury demands be noted in the caption of the case, includes a jury demand only in the body of the pleading. The proscription of paragraph (2) is narrowly drawn - - covering only violations attributable to nonwillfull failure to comply and only those involving local rules directed to matters of form."

Fed.R.Civ.P. 83, 1995 Notes of Advisory Committee (emphasis added).

Local Rule 7.1(b)(1) of the United States District Court for the Northern District of Texas states as follows:

" b. **Certificate of Conference.**

1. Each motion for which a conference is required must include a certificate of conference indicating that the motion is unopposed or opposed,

2. If a motion is opposed, the certificate must state that a conference was held, indicate the date of the conference and indicate the identities of the attorneys conferring, and explain why agreement could not be reached.

3. If a conference was not held, the certificate must explain why it was not possible to confer, in which event the motion will be presumed to be opposed."

Here, the record shows Petitioners' counsel had advised the district court in the body of a three-page motion that he had conferred with Respondents' counsel and that Respondents' counsel had advised Petitioners' counsel that he was opposed to the court granting Petitioners' motion for an extension of time to comply with Respondents' Requests for Admissions and other discovery materials, rather than, attaching a separate certificate of conference to the motion. Therefore, Petitioners' counsel's error was merely an error of form which falls under the savings

clause of Fed.R.Civ.P. 83(a)(2) to protect against the loss of rights.

The Fifth Circuit's opinion affirming the district court's judgment is devoid of any reference to the protection afforded a litigant under Fed.R.Civ.P 83(a)(2), which arises when a litigant commits a violation of N.D. TEXAS LOCAL RULE 7.1(b)(1) related to matters of form.

Moreover, the undersigned's research has been unable to unearth a single Fifth Circuit case which squarely addressed the issue of a district court ordering the clerk to unfile a motion because a litigant's attorney failed to attach a separate certificate of conference which served as grounds for the opposing party being able to obtain summary judgment in their favor. In fact, the only case wherein a federal appeals court has addressed N.D. TEXAS LOCAL RULE 7.1 appears to be **Construction Drilling, Inc., v. Chusid,** 131 Fed.Appx. 366 (3rd Cir. 2005).

This unpublished opinion shows that the Third Circuit held that the total failure of a litigant to comply with N.D. TEXAS LOCAL RULE 7.1 did not preclude a Texas district court from entering a judgment against a party in the amount of $2,400,000, even though, the Texas district court did not give the party 20 days to respond as required pursuant to N.D. TEXAS LOCAL RULE 7.1(e).

Thus, applying the Third Circuit's reasoning to the facts of this case, the Fifth Circuit's decision affirming the district court decision to unfile Petitioners' motions for a technical violation of N.D. TEXAS LOCAL RULE 7.1(B)(1) is in direct conflict with the Third Circuit Court of Appeals unpublished decision in **Chusid.**

2.

This case presents an issue of first impression because the question of whether a district court may enforce a local rule in a manner which causes a party to lose rights contrary to the savings clause provided under Federal Rule of Civil Procedure 83 (a)(2) has never been squarely addressed by this Court.

This Court does not merely sit to correct errors by other courts. It does, however, have supervisory authority over the other federal courts when they adopt and enforce local rules to ensure that these local rules are in fact consistent with " ' the principles of right and justice.' " **Frazier v. Heebe,** 482 U.S. 641, 96 L.Ed. 2d 557, 107 S.Ct. 2607, (1997) (citing **In re Ruffalo,** 390 U.S. 544, 554, 20 L.Ed.2d 117, 88 S.Ct. 1222, (1968) at pg. 565). In **Frazier,** this Court used its supervisory powers to declare a Federal District Court rule that Louisiana bar members reside or maintain an office in Louisiana in order to be admitted to the District Court bar to be invalid.

Federal Rule of Civil Procedure 83(a)(2) is fairly new. The undersigned's research has been unable to unearth a single case wherein this Court has addressed a district court's enforcement of a local rule in a manner which causes a party to lose rights in contravention of the savings clause provided under Fed.R.Civ.P. 83(a)(2).

This case was decided on summary judgment. The record, therefore, will not overburden this Court. However, as previously discussed, this case should not have been decided on summary judgment.

Moreover, deciding the following substantive question would simultaneously clarify an important procedural point within this Court's supervisory authority: May a district court enforce a local rule in a manner that causes a party to have summary judgment being entered against the party in contravention of Fed.R.CIV.P. 83(a)(2)?

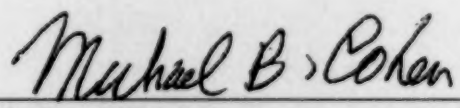
CONCLUSION

A United States District Court in contravention of the savings clause contained in Fed.R.CivP. 83(a)(2), based upon a technical violation of form of N.D. TEXAS LOCAL RULE 7.1(b)(1), has denied Petitioners their right under the Seventh Amendment to have their claims decided by a jury.

The Fifth Circuit Court of Appeals has failed to address this issue in their opinion affirming the district court's decision to unfile Petitioners' motions which subsequently provided the Respondents with grounds to obtain summary judgment in their favor.

For the foregoing reasons, Petitioners respectfully requests this Court to grant their Petition for Certiorari.

Respectfully submitted,



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Opinion of the United States Court of Appeals for the Seventh Circuit decided February 17, 2006 B-1 to B7

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 07-10834
Summary Calendar

RICHARD SHARIF, AS AGENT FOR SOAD WAITAR, HAIFA KAJ, AND RAGDA SHARIFEH; WAQAR KHAN; SHAFQUT KHAN; ABDUL RASHID; SHAHEEN RASHID

Plaintiffs-Appellants

v.

WELLNESS INTERNATIONAL NETWORK, LTD a/k/a WIN; RALPH OATS; CATHY OATS; WIN NETWORK INC.

Defendants-Appellees

Appeal from the united States District Court for the Northern District of Texas
(3:05-CV-1367)

Before WIENER, GARZA, and BENAVIDES, Circuit Judges. Per Curiam:*

After this appeal was dismissed for Appellants' failure

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* Pursant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4

order a transcript timely and make financial arrangements with the court reporter, it was reinstated on September 26, 2007, leaving pending in the district court Appellees' motion for at least $425,000 attorney's fees pursuant to Fed.R.Civ.P. 54(d). A review of the record on appeal demonstrates Appellants' untimely performance in this court mirrors a lengthy history in the district court of dilatoriness and hollow posturing interspersed with periods of non-performance or insubstantial performance and compliance by Appellants and their counsel, leaving the unmistakable impression that they have no purpose other than to prolong this contumacious litigation for purposes of harassment or delay, or both. The time is long overdue to terminate Appellants' feckless litigation at the obvious cost of time and money to the Defendants by affirming tall rulings of the district court but remanding the case to that court for the reinstatement of its consideration of Appellees' motion for attorney's fees. In so doing, we caution Appellants that any further efforts to prolong or continue proceedings in this court, including the filing of petitions for rehearing, will potentially expose them to full panoply of penalties sanctions, damages, and double costs pursuant to FRAP 38 at our disposal.[1]

AFFIRMED; REMANDED FOR RULING AND DETERMINATION OF APPELLEES' MOTION FOR ATTORNEY'S FEES.

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[1] Appellants have filed a motion for reconsideration of the denial to file a reply brie out of time. The motion for reconsideration is DENIED.

In the
United States Court of Appeals
For the Seventh Circuit

No. 05-2636
PRATIMA J. MUZUMDAR AND TRANQUIL PASSAGE

Plaintiffs-Appellants

v.

WELLNESS INTERNATIONAL NETWORK, LTD.
WIN NETWORK, INC., RALPH OATS, CATHY OATS
AND SHERRI MATTHEWS,

Defendants-Appellees

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 04 C 6175—**Charles R. Norgle, Sr.**, *Judge*

Nos. 05-2686 & 05-2827
Richard Sharif, Abdul Rashid, *et al.*,

Plaintiffs-Appellants,

v.

WELLNESS INTERNATIONAL NETWORK, LTD.
WIN NETWORK, INC., RALPH OAKES, CATHY OATES,
and SHERRI MATTHEWS.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 02 C 3047 & 02 C 5801—**Samuel Der-Yeghiayan**, *Judge*

Argued January 12, 2006—Decided February 17, 2006

Before FLAUM, *Judge*, and BAUER and EVANS, Circuit Judges.

EVANS, *Circuit Judge*. These cases are before us again: this time the issue involves forum selection clauses. Previously, in *Sharif v, Wellness International Network, Ltd.*, 376 F 3d 720 (7th Cir. 2004)[1], we reviewed and reversed a denial of a motion of compel arbitration with the result that claims less than $100,000 were subject to arbitration. That left some claims for consideration by the court. Before us now the question is "what court?"

The cases were filed in the United States District, Court for the Northern District of Illinois. The Muzumdar case comes to us from Judge Charles R. Norgle, Sr. and the Sharif and Rashid cases from Judge Samuel Der-Yeghiayan. The result in all three was the same: They were dismissed without prejudice pursuant to forum selection clauses found in the relevant contracts. Both judges found that the proper forum was Dallas County, Texas. The plaintiffs appeal.

A challenge to venue based upon a forum selection clause can appropriately be brought as a motion to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(3). Our review of the enforceability of a forum selection clause is de *novo. Continental Ins. Co. v. M/V Orsula* 354 F.3d 603 (7th Cir. 2003)

1. The Sharif and Rashid actions were consolidated and were the subject of the first decision in this court. The Muzumdar plaintiffs withdrew from the first appeal.

The lawsuits involved distribution contracts that the plaintiffs had with Wellness International Network (WIN). The appellants contend that while WIN claims to be in the business of selling health and wellness products, it was actually engaged in an illegal pyramid scheme. The appellants assert a number of claims, including violations of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1962), federal securities laws, and various Illinois statutes.

Each appellant signed either an associate agreement or a distributor agreement. The associate agreement says:

> JURIS DICTION AND VENUE OVER ANY DISPUTES ARISING OUT OF THIS AGREEMENT SHALL BE PROPER ONLY IN THE FEDERAL OR STATE COURT IN DALLAS COUNTY, TEXAS.

The distributor agreement says.

> ANY DISPUTE OR CLAM ARISING UNDER OR IN CONNECTION WITH THIS AGREEMENT OR WITH RESPECT TO THE BUSINESS RELATIONSHIP ESTABLISHED BY THE AGREEMENT . . . SHALL BE PROPERT ON/BEFORE AN ARBITRATION PANEL CONVENED, OR IN A STATE OR FEDERAL COURT PRESIDING IN DALLAS COUNTY, TEXAS . . .

The clauses certainly seem clear enough, especially because under either federal or Illinois law, forum selection clauses are valid and enforceable. *IFC Credit Corp. v. Aliano Bros. Gen. Contractors, Inc., 2006 Wl 230179,__F.3d__ 7th Cir. Feb. 1 2006).*[2] There is no ambiguity about where the parties agreed to litigate this

dispute. What then do the appellants argue?

They contend that in the WIN rules and regulations negates the mandatory forum selection clause. The WIN rules state.

> Each distributor hereby irrevocably and unconditionally submits themselves and their property to the non-exclusive jurisdiction of any arbitration panel convened, or a court of competent jurisdiction in Dallas County, Texas, and further irrevocably and unconditionally waives, to the fullest extent that a distributor may legally and effectively do so, any objection that such distributor may have now or hereafter to such venue, including the defense of any inconvenient forum.

This provision, written in the usual mumbo-jumbo of lawyer speak, supersedes the contract language, appellant argue, because the contract says so. The associate contract and the distributor contract state:

> I HAVE READ THE WIN RULES & REGULATIONS AND I AGREE THAT THEY ARE INCORPORATED BY REFERENCE INTO THIS AGREEMENT IN PRESENT FORM AND THAT THEY ALSO MAY BE AMENDED BY WIN FROM TIME TO TIME.

The distributor agreement further states:

---

2. IFC held open the question as to whether state or federal law applies in a dispute over a forum selection clause when the case is dismissed rather than transferred pursuant to 28 U.S.C. § 1404(a). We see no need to examine that question in this case.

IN THE EXTENT THAT THERE ARE ANY CONFLICTS BETWEEN THIS AGREEMENT AND THE WIN RULES & REGULATIONS SHALL GOVERN.

The argument is that the WIN rules language — "non-exclusive jurisdiction" — which renders the forum selection clauses permissive; because the WIN Rules govern, the argument continues, the forum selection clauses are merely permissive. Appellants leap from the phrase "non-exclusive jurisdiction" to the issue of forum or venue, because the provision in the Win rules is entitled "Venue." However, that word cannot carry so much weight. The WIN rules also provide that titles and subtitles are inserted for convenience and do not affect the meaning of the rules, and the provision itself refers only to jurisdiction.

Therefore, what Win rules provide is a nonexclusive jurisdiction provisions, requiring the appellants to submit to the personal jurisdiction of the Texas courts. We cannot find that a provision which requires appellants to submit to the "non-exclusive" jurisdiction of Texas courts somehow undermines a very strongly worded forum selection clause containing mandatory language: "SHALL BE PROPER ONLY" or "SHALL BE PROPER" in Dallas County, Texas. We have found such mandatory language to require enforcing a forum selection clause. We have said that where venue is specified with mandatory or obligatory language, the clause will be enforced; where only jurisdiction is specified, the clause will generally not be enforced unless there is some further language indicating the parties' intent to make venue exclusive. *See*

Paper Express, Ltd. V. Pfankuch Maschinen GmbH, 972 F.2d 753 (7th Cir. 1992)

Appellants also spend a good deal of time trying to convince us that because the contracts themselves are void and unenforceable as against public policy — i.e., they set out a pyramid scheme — the forum selection clauses are also void. The logical conclusion of the argument would be that the federal courts in Illinois would first have to determine whether the contracts were void before they could decide whether, based on the forum selection clauses, they should be considering the cases at all. An absurdity would arise if the courts in Illinois determined the contracts were not and that therefore based on valid from selection clauses the cases should be sent to Texas — for what? A determination as to whether the contracts are void?

What is true is that a forum selection clause can be found invalid because the clause itself was procured by fraud. As the court established in *The Breman v. Zapata Off Shore Co.*: 407 US 1, 15 (1972), a forum selection clause will be enforced unless it can be clearly shown "that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." Appellants make no attempt to show that the forum selection clause was itself obtained by fraud.

The appellants contend, however, that this contract was a contract of adhesion. We reject that contention. The appellants were parties to what a somewhat sophisticated business deal. It is hard to conclude that they would have signed a contract worth more than $100,000 without

considering its provisions. Contrast this situation with one involving a truly nonnegotiated contract. In Carnival *Cruise Lines, Inc. v. Shute,* 499 U.S. 585 (1991), the Supreme court held that even a forum selection clause in a commercial passage contract — that is, a ticket for a cruise — was enforceable. The forum selection clauses in these cases are enforceable.

Accordingly, the judgments of the district court dismissing these cases are AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for Seventh Circuit

Supreme Court, U.S.
FILED
JUL 7 - 2008
OFFICE OF THE CLERK

No. 08-507

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD SHARIF, ET AL.,

Petitioners,

vs.

WELLNSS INTERNATIONAL NETOWRK, LTD.
WIN NETWORK, INC., ET AL.,

Respondent.

PETITIONERS' SUPPLEMENTAL APPENDIX

Law Office of Michael B. Cohen
35 E. Wacker Drive, Suite 1525
Chicago, Illinois 60601
(312) 726-0739

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

RICHARD and SOUZAN SHARIF,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**No. 02 C 3047**
	)	
WELLNESS INTERNATIONAL NETWORK, LTD., A/K/A WIN; WIN NETWORK, INC.; RALPH OATS CATHY OATS; and SHERI MATTHEWS, DR. ANWAR MOHIUDDIN and DR. FATIMA MOHIUDDIN,	)	
	)	
Defendants.	)	

MEMORANDUM OPINON

SAMUEL DER-YEGHIAYAN, District Judge

This matter is before the court on Defendants' motion to compel arbitration and motion to dismiss. For the reasons stated below, we vacate our denial of Defendants' motion to compel arbitration, grant the motion to compel arbitration, grant the motion to compel arbitration, and grant the motion to dismiss.

BACKGROUND

Plaintiffs entered into agreements with Defendants to sell Defendants' health and personal care products. Plaintiffs allege that Defendants' business was actually an illegal pyramid scheme and that Defendants engaged in fraud. Plaintiffs brought the instant action seeking to have their agreements with defendants declared null and void as contrary to Illinois law and public policy, and to recover for loss and damage to Plaintiffs' business and property. On October 20, 2003, Defendants filed a motion to compel arbitration, asserting that the agreements signed by Plaintiffs contained a clause that provided that disputes between Plaintiffs and Defendants would be referred to arbitration. On October 23, 2003, we denied the motion to compel arbitration. Defendants appealed the ruling and on November 7, 2003, Defendants moved to stay this action pending the appeal. On December 4, 2003, we denied the motion to stay, finding that the action should not be

stayed because Defendants had a motion to dismiss for improper venue pending at the time that the motion to compel arbitration was filed. (12/04/03 ruling p. 2-3). On appeal the Seventh Circuit remanded the case back to this court and ordered the court to vacate the denial of Defendant's motion to compel arbitration and to "order arbitration on those claims subject to arbitration." *Sharif v. Wellness Intern. Network, Ltd.*, 376 F 3d 720, 727 (7th Cir. 2004).

DISCUSSION

The parties agree that seven of the Plaintiffs' claims are subject to arbitration and therefore should be ordered to arbitration. Therefore, we order to arbitration the claims of: 1) Rosee Torres, 2) Peggy Carey, 3) Oussama and Ghina Jammal, 4) Ali and Abida Jammal, 5) Mahmoud Yassin and Taghreen Nassar, 6) Abdullatif and Nabilah Saleh, and 7) Hamid and Maimoona Khan.

I. Abuelizam Claims

In regards to the claims brought by Plaintiffs Elias and Raida Abuelizam ("Abuelizam claims"), Plaintiffs argue that the Abuelizam claims involve more that $100,000 and are therefore exempt from the arbitration provision. Plaintiffs argue that the Abuelizam claims are worth $90,000 in damages and that Plaintiffs' attorneys will receive a twenty-five percent contingency fee. On appeal the Seventh Circuit clearly stated that "only those plaintiffs with claims less that $100,000 must be compelled to arbitrate" and that "[a]ccording to the complaint, the majority of plaintiffs have such claims" and that "the plaintiffs plead that 8 of the 11 claims are for damages of less that $100,000." *Id.* The Abuelizam claims would be included in the Seventh Circuit's computation of "8 of the 11 claims" and Plaintiffs' contention that only 7 of the 11 claims are subject to arbitration is inconsistent with the Seventh Circuit's ruling. In fact Plaintiffs

specifically argued in their reply brief before the Seventh Circuit on appeal that "Elias and raida Abuelizam, had lost investments of $90,000 . . .; even allowing for minor attorneys' fees and costs, they easily satisfy the $100,000 exclusion figure." (App. Reply. 15). However even after Plaintiffs' argument was made, the Seventh Circuit issued its ruling, finding that "8 of the 11" claims are plead for less that $100,000. *Sharif,* 376 F.3d at 727.

The Seventh Circuit also found on appeal that Plaintiffs' attempts to artificially raise the claims above the $100,000 amount were improper noting that the legal certainty test is not the proper test and noting that the Plaintiffs could not aggregate their claims to meet the amount in question. *Id.* We also note that Defendants assert that typically a contingency fee is based upon the total recovery on the Abuelizam claims and that Plaintiffs' attorneys would be paid out of the total $90,000 recovered. Plaintiffs have not sought to file a sur-reply to contest this

fact. Therefore, we order the Abuelizam claims to arbitration.

II. Remaining Claims

Defendants argue that this court should dismiss the remaining three claims of Plaintiffs that have allegedly sustained damages of more that $100,000. Defendants argue that for the Plaintiffs bringing the remaining three claims there was a forum selection clause in the Associate Agreements signed by Plaintiffs providing that disputes would be addressed in Texas. The Seventh Circuit has held that where a forum selection clause specifies venue with "mandatory or obligatory language," the clause is a mandatory forum selection clause, limiting litigation to the designated venue. *Paper Express Ltd. v. Pfankuch Maschinen GmbH,* 972 F.2d 753, 757 (7th Cir. 1992). However, if the clause instead merely refers to "jurisdiction," it is generally not mandatory unless some

further languages expresses "the parties" intent to make venue exclusive." *Id.*

In the Associate Agreements signed by plaintiffs, the forum selection clause stated the following: "Jurisdiction and venue over any disputes arising out of this agreement shall be proper only in the federal or state courts in Dallas County, Texas." (Agr. Par. 24). Such language clearly indicates that the clause is mandatory and that it provides for exclusive jurisdiction in Texas courts.

Plaintiffs argue that the forum selection clause should not be interpreted as mandatory because of language in the consent-to-personnel jurisdiction clause in the Distribution Agreements signed by Plaintiffs that refers to "non-exclusive jurisdiction." However, as Defendants correctly point out the consent-to-personal jurisdiction and venue clauses serve different purposes and the consent-to-personal jurisdiction clause in the

Distribution Agreements in no way detract from the clear and express statement in the forum selection clause that all actions will be brought in Dallas, Dallas County, Texas. *See CIT Group/Credit Finance Inc. v. Lott,* 1993 WL 15617, at*1 (N.D..III. 1993) (upholding forum selection clause despite the fact that in regards to personal jurisdiction the agreements stated that the "Guarantor hereby irrevocably submits and consents and to the non-exclusive jurisdiction of the state and federal courts . . ."). Therefore, we grant Defendants' motion to dismiss the remaining three claims of Plaintiffs that have allegedly sustained damages of more that $100,000.

CONCLUSION

Based on the foregoing analysis, we vacate our denial of Defendants' motion to compel arbitration, grant the motion to compel arbitration, and order certain claims to arbitration as indicated above. We also grant

Defendants' motion to dismiss the remaining three claims of Plaintiffs that have allegedly sustained damages of more that $100,000.

Samuel Der-Yeghiayan
United States District Court Judge

Dated: December 1, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROSEE TORRES; OUSSAMA and GHINA JAMMAL; ELIAS and RAIDA ABUELIZAM; PRATIMA J. MUZUMDAR; TRANQUIL PASSAGE LLC; ABDUL and SHAHEEN RASHID; WAQAR and SHAFQUT KHAN; McERLEAN-CAREY; MAHMOUD YASSINand TAGHREED NASSAR; ALI S. and NABILAH SALEH and Hamid AND MAIMOONA KHAN,	)	
Plaintiffs,	)	
v.	)	**No. 02 C 5801**
WELLNESS INTERNATIONAL NETWORK, LTD., A/K/A WIN; WIN NETWORK, INC.; RALPH OATS CATHY OATS; and SHERI MATTHEWS,	)	
Defendants	)	

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between Plaintiffs and Defendants would be referred to arbitration. On October 23, 2003, we denied the motion to compel arbitration. Defendants appealed the ruling and on November 7, 2003, Defendants moved to stay this action pending the appeal. On December 4, 2003, we denied the motion to stay, finding that the action should not be stayed because Defendants had a motion to dismiss for improper venue pending at the time that the motion to compel arbitration was filed. (12/04/03 ruling p. 2-3). On appeal the Seventh Circuit remanded the case back to this court and ordered the court to vacate the denial of Defendant's motion to compel arbitration and to "order arbitration on those claims subject to arbitration." *Sharif v. Wellness Intern. Network, Ltd.*, 376 F 3d 720, 727 (7th Cir. 2004).

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exclusive jurisdiction of the state and federal courts . . .").

Therefore, we grant Defendants' motion to dismiss the remaining three claims of Plaintiffs that have allegedly sustained damages of more that $100,000.

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Based on the foregoing analysis, we vacate our denial of Defendants' motion to compel arbitration, grant the motion to compel arbitration, and order certain claims to arbitration as indicated above. We also grant Defendants' motion to dismiss the remaining three claims of Plaintiffs that have allegedly sustained damages of more that $100,000.

Samuel Der-Yeghiayan
United States District Court Judge

Dated: December 1, 2004

Supreme Court, U.S.
FILED
NOV 14 2008
OFFICE OF THE CLERK

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(3)

No. 08-507

IN THE
Supreme Court of the United States

RICHARD SHARIF, ET AL.,

Petitioners,

v.

WELLNESS INTERNATIONAL NETWORK, LTD., ET AL.,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition, where the Fifth Circuit acted within the accepted and usual course of judicial proceedings by affirming the district court's orders unfiling a discovery motion for failure to follow local filing rules, without prejudice to resubmitting the motion in proper form.

II. Whether Petitioners have presented compelling reasons to grant the Petition, where the Fifth Circuit's unpublished decision is not in conflict with a decision of this Court or a Court of Appeals.

III. Whether Petitioners have presented compelling reasons to grant the Petition, where the district court's proper enforcement of a local rule is not a case of first impression meaningful enough to merit this Court's review.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Wellness International Network, Ltd. does not have a parent corporation and there is no publicly held company that owns a 10% or greater interest in the company.

Respondent WIN Network, Inc. does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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The District Court rulings and opinions cited in this Brief in Opposition are printed at Resp. App. 1-56.

INTRODUCTION

The position in which Petitioners find themselves is self-inflicted, and ultimately doomed by a complete lack of a meritorious lawsuit. After half-heartedly pursuing groundless claims against Respondents in two different forums over the course of five years, Petitioners willfully chose not to re-file a motion for extension of time with a proper certificate of conference, despite being twice afforded the opportunity to do so by the district court. Petitioners have not lost rights because of a nonwillful failure to comply with local rules, toward which the savings clause of Federal Rule 83(a)(2) is directed. Rather, Petitioners consciously and repeatedly chose to ignore the district court's direction to follow its local filing rules. Petitioners continue to waste time and judicial resources by trying to blame everyone but themselves for the long overdue dismissal of this lawsuit.

Moreover, Petitioners' failure to follow local filing rules has only peripheral, if any, bearing on the dismissal of Petitioners' claims. When Respondents moved for summary judgment on the grounds that, *inter alia*, Petitioners had no evidence to support any of their claims, Petitioners responded with no evidence whatsoever. Petitioners submitted no affidavits, no declarations, no deposition transcripts,

no documents, no reports, and no tangible items – indeed make no effort at all to save their claims against summary judgment. As Petitioners themselves note, the district court granted summary judgment against them on two grounds, one being their deemed admissions, and the second being their failure to point to any evidence that would support a finding in their favor at trial. Both are due to Petitioners' own willful conduct. Petitioners failed to timely respond to discovery, resulting in admissions being deemed against them as a matter of law. After twice failing to properly re-file their request for extension of time to respond to the request for admissions, Petitioners inexplicably waited three months to move to vacate the deemed admissions. In their motion to vacate, Petitioners made no attempt to meet their burden of showing that the presentation of the merits would be promoted by having their deemed admissions withdrawn. In response to Respondents' motion for summary judgment, Petitioners offered no evidence.

In short, Petitioners provided no possible grounds on which the district court could have granted their motion to vacate deemed admissions, nor any grounds on which the district court could have ruled in their favor on summary judgment. The district court did not dismiss Petitioners' claims because Petitioners failed to comply with a local filing rule; the district court dismissed Petitioners' claims because Petitioners failed to meet their burdens throughout the motion practice in this case. Petitioners' dilatoriness and apathetic failure to establish any merit to their claims more than gently describes the entire tenor of their lawsuit, which the

district court correctly dismissed and the Fifth Circuit aptly described as "feckless."

This Court should deny Petitioners' petition because the Fifth Circuit's affirmation of dismissal is correct, it does not stray from the accepted and usual course of judicial proceedings, and it is an unpublished opinion with no precedential import. There is no conflict within the circuits to resolve, nor is this a case of first impression on an important issue of law.

STATEMENT OF THE CASE

A. District Court Proceedings

After unsuccessfully attempting to sustain a lawsuit in Illinois in violation of the venue clauses in their contractual agreements, Petitioners Richard Sharif, Waqar and Shafqut Khan, and Abdul and Shaheen Rashid ("Petitioners") filed a complaint on July 8, 2005, in the United States District Court for the Northern District of Texas against Respondents Wellness International Network, Ltd., WIN Network Inc., Ralph Oats, Cathy Oats, and Sheri Matthews ("Respondents" or "WIN"), asserting declaratory judgment actions and other claims in an attempt to avoid their contractual obligations with Wellness International Network, and seeking damages of almost $1 million.

Petitioners subseque ntly filed an Unopposed Motion to Stay the Texas action, pending the outcome of an appeal of the dismissal of the improper lawsuit filed by Petitioners against Respondents in the Northern District of Illinois. On December 29, 2005, the district court granted the Unopposed Motion to Stay the instant case. The Seventh Circuit affirmed the dismissal of the Illinois action for improper venue. *See Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759, 762 (7th Cir. 2006).

On July 27, 2006, the Texas district court lifted the stay and, shortly thereafter, issued a Scheduling Order on August 22, 2006. Respondents timely served their Initial Disclosures pursuant to FED. R. CIV. P. 26(a). Petitioners never served their

Initial Disclosures. At no point in the case did Petitioners propound written discovery, designate any experts, request any depositions, or otherwise conduct any other discovery.

On November 20, 2006, Respondents se rved written discovery requests on Petitioners, including requests for admissions to each Petitioner. The deadline for Petitioners to respond to these requests was December 20, 2006. On that day, Petitioners filed a motion for extension of time (hereinafter "Motion for Extension") to respond to the written discovery in its entirety by 60 additional days. The district court ordered the district clerk to unfile the request on January 5, 2007, noting that Plaintiffs' motion failed to abide by N.D. TEXAS LOCAL RULES in two respects: by failing to include a certificate of conference and by failing to include a certificate of service. A Notice of Deficiency from the clerk to Petitioners identified exactly what was missing from Petitioners' motion, and cited the governing local rule.

On January 9, 2007, Petitioners re-filed a renewed motion for extension of time (hereinafter the "Renewed Motion") (Both the Motion for Extension and Renewed Motion for Extension are sometimes hereinafter referred to as the "Extension Motions."), but again failed to include a certificate of conference. Accordingly, the district court ordered the clerk to unfile the Renewed Motion on January 11, 2007. Again the clerk sent Petitioners a Notice of Deficiency.

Rather than simply remedying the easy-to-cure defect, Petitioners chose to ignore the Notice of

Deficiency and made no further attempts to request an extension of time to respond to discovery. At no time did Petitioners file a renewed motion containing the required certificate of conference.

Instead, three months after the request for admissions were due, Petitioners filed a Motion to Vacate Alleged Defaulted Admissions ("Motion to Vacate") on March 22, 2007. In the Motion to Vacate, Petitioners quoted the text of FED. R. CIV. P. 36(b), but made no attempt to meet their burden of demonstrating that the presentation of the merits would be promoted by withdrawal of the deemed admissions, or demonstrate how the requirements of Rule 36(b) applied in this case. Petitioners also failed to explain why they could not timely respond to the requests for admissions by the original due date (December 20, 2006), or by the date requested in their unfiled Extension Motions (February 12, 2007).

Rather than explaining their dilatoriness and attempting to meet their burden on a Rule 36(b) motion, Petitioners bemoaned the unfiling of their Extension Motions and made the incorrect, inconsequential argument that deemed admissions are not automatic but require court order. The Motion to Vacate was referred to Magistrate Judge Paul Stickney, who rightly denied the motion on April 12, 2007. Resp. App. 1-2. Petitioners did not appeal the denial of their Motion to Vacate to the Fifth Circuit.

On April 22, 2007, Petitioners filed an Objection to the Magistrate Judge's ruling on their Motion to Vacate. The district court overruled Petitioners' objections on May 7, 2007, ruling that

Petitioners failed to show that the Magistrate Judge's ruling was clearly erroneous or contrary to law. The district court specifically noted it was not the court's unfiling of Petitioners' Extension Motions that caused admissions to be deemed against them, but Petitioners' failure to correct the filing defect and their failure to timely move to vacate the admissions:

> Plaintiffs miss the point. Plaintiffs had admissions deemed against them not because of their failure to include a certificate of conference but rather because Plaintiffs never corrected their defective Motions to Extend to comply with the local rules and, more importantly, because Plaintiffs inexplicably waited until three months after their responses to Defendants' requests were due to move to withdraw the admissions. At no point did the Court inform Plaintiffs that they could not file a motion to extend their response deadline (in fact, had Plaintiffs properly filed such a motion it assuredly would have been granted); it simply instructed them that the motions they did file failed to conform to the local rules of this district. Reasonably prudent counsel would have promptly corrected this error by re-filing the motion with a proper certificate. Plaintiffs' counsel chose not to do so, and Plaintiffs must now bear the responsibility for that decision and for their own lack of diligence in ultimately

> moving to vacate their deemed admissions.

Resp. App. 14-15.

The district court made clear that, had Petitioners properly filed an extension motion, it "assuredly" would have granted it and that Petitioners' counsel made the intentional choice not to do so. *Id.* Petitioners did not appeal the district court's overruling of their objections to the Fifth Circuit.

On May 9, 2007, the district court granted, in part, Respondents' Motion to Dismiss, filed back in August 2005. The district court dismissed all claims asserted by Soad Wattar, Haifa Kaj, and Ragda Sharifeh for lack of standing and failure to state a claim. The Court also dismissed with prejudice all claims asserted against Sheri Matthews for failure to state a claim. It dismissed without prejudice all claims asserted against Cathy Oats for failure to comply with FED. R. CIV. P. 9(b). The district court also dismissed without prejudice all claims asserted against Ralph Oats for failure to comply with FED. R. CIV. P. 9(b), except for certain allegations made in connection with Petitioners' common law fraud claim. The Court also dismissed without prejudice Petitioners' RICO claims in their entirety for failure to meet the heightened pleading requirements of Rule 9(b) and for failure to state a claim. The Court gave Petitioners 15 days to, "consistent with Rule 11 of the federal rules, file an amended complaint if they so choose in compliance with the particularity requirements of Rule 9(b) and Fifth Circuit case law

and the requirements necessary to state a valid RICO claim." Resp. App. 43.

Petitioners did not appeal the Court's ruling on the Motion to Dismiss to the Fifth Circuit.

On May 24, 2007, Petitioners filed a First Amended Complaint, asserting two causes of action: (1) violation of the Texas DTPA, and (2) "RICO claims," asserting violations of 18 U.S.C. §§ 1962(a)-(c). On June 5, 2007, Defendants filed a Partial Motion to Dismiss the First Amended Complaint, for failure to comply with Rule 9(b) and failure to state a claim under Rule 12(b)(6).

On June 11, 2007, Respondents filed a Motion for Summary Judgment as to all remaining claims, based on, *inter alia*, the following grounds: (1) Petitioners' deemed admissions either negated the existence of a material element on each of Petitioners' claims, or established that there was no evidence to support one or more essential elements on each of Petitioners' claims; and (2) no evidence existed to support any of Petitioners' claims.

On July 3, 2007, Petitioners filed a four-page response to the Motion for Summary Judgment, with no supporting evidence of any kind. Petitioners did not respond to Respondents' arguments, nor did they attach any evidence to their response. Petitioners did not request additional discovery to respond to the summary judgment motion, as permitted by FED. R. CIV. P. 56(f).

Having been presented with no grounds on which it could deny summary judgment, on July 16,

2007, the district court granted Respondents' Motion for Summary Judgment on all claims. The district court based its ruling on two grounds: (a) that the deemed admissions negated the existence of a material element on each of Petitioners' claims; and (b) Petitioners failed to point to any evidence that would support a finding in their favor at trial. Resp. App. 51-56. Both reasons for granting summary judgment are traceable to Petitioners' own conduct. Petitioners' dilatoriness in discovery resulted in admissions being deemed against them. Petitioners' failure to proffer proper argument or evidence to meet their burden on a Rule 36(b) motion resulted in the denial of their Motion to Vacate the deemed admissions. Petitioners' deemed admissions, together with their failure to offer any evidence to refute Respondents' summary judgment motion, sounded the death knell of dismissal for their claims.

Petitioners did not appeal the district court's ruling on Respondents' Motion for Summary Judgment to the Fifth Circuit.

B. Petitioners' Appeal to the Fifth Circuit

Petitioners appealed the judgment to the United States Court of Appeals for the Fifth Circuit. Petitioners' sole issue on appeal was whether the district court abused its discretion "when it ordered the clerk of the district court to unfile [Petitioners'] motion seeking an extension of time to comply with [Respondents'] request for admissions and other discovery materials arising from [Petitioners'] technical non-compliance with Local Rule 7.1(b)(1), because the [Petitioners] advised the district court in said motion that [Respondents' counsel] opposed said

motion, rather than, attaching a separate certificate of conference to said motion." Petitioners did not appeal any of the fatal dispositive motions ruled on by the district court.

Petitioners failed to meet a number of briefing deadlines in the Fifth Circuit, a fact not unnoticed by that Court. When briefing was complete, the Fifth Circuit condemned Petitioners' lawsuit as "feckless" and "contumacious" and their performance as "hollow posturing":

> A review of the record on appeal demonstrates that [Petitioners'] untimely performance in this court mirrors a lengthy history in the district court of dilatoriness and hollow posturing interspersed with periods of nonperformance or insubstantial performance and compliance by [Petitioners] and their counsel, leaving the unmistakable impression that they have no purpose other than to prolong this contumacious litigation for purposes of harassment or delay, or both. The time is long overdue to terminate [Petitioners'] feckless litigation at the obvious cost of time and money to the [Respondents] by affirming all rulings of the district court but remanding the case to that court for the reinstatement of its consideration of [Respondents'] motion for attorney's fees. In so doing, we caution [Petitioners] that any further efforts to prolong or continue proceedings in this

> court, including the filing of petitions for rehearing, will potentially expose them to the full panoply of penalties, sanctions, damages, and double costs pursuant to FRAP 38 at our disposal.

Pet. App. A-2. *See also Sharif v. Wellness Int'l Network, Ltd.*, 273 Fed. Appx. 316, 316 (5th Cir. 2008) (unpublished).

Following the fifth Circuit's remand for consideration of Respondents' attorneys' fees as noted above, the district court awarded Respondents $655,596.13.[1] With respect to the instant petition for writ of *certiorari*, Petitioners attempted unsuccessfully to file it twice, once in July 2008 and again in September 2008. On both occasions, the Supreme Court clerk returned the pleading to Petitioners' counsel for failure to comply with Supreme Court Rules.

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[1] Incredibly, despite having filed no response to the motion for attorney fees, Petitioners have appealed this award to the Fifth Circuit.

ARGUMENT

I. Petitioners have not presented compelling reasons to grant the Petition, where the Fifth Circuit acted within the accepted and usual course of judicial proceedings by affirming the district court's orders unfiling a discovery motion for failure to follow local filing rules, without prejudice to resubmitting the motion in proper form.

Petitioners argue the district court's enforcement of its local filing rule requiring a certificate of conference contravenes Federal Rule of Civil Procedure 83(a)(2). It does not.

As an initial matter, Petitioners have not preserved this point for appeal. Petitioners did not bring a Rule 83(a)(2) argument before the Fifth Circuit. Nowhere in their appellate brief to the Fifth Circuit did Petitioners cite Rule 83, nor did they make an argument based on Rule 83 to the district court. Therefore, Petitioners have waived this argument and their petition for writ of certiorari may be denied on this ground alone. Nonetheless, Respondents will address Petitioners' argument that N.D. Texas Local Rule 7.1(b) contravenes Federal Rule of Civil Procedure 83(a)(2).

Local Rule 7.1(b)(1) of the Northern District of Texas requires a certificate of conference be included with all non-dispositive motions.[2] Pleadings that do

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[2] Local Rule 7.1(b)(1) states: "Each motion for which a conference is required must include a certificate of conference indicating that the motion is unopposed or opposed."

not conform with the local rules may be stricken at the discretion of the court. *See Bell, Boyd & Lloyd v. Tapy*, 896 F.2d 1101, 1103 (7th Cir.1990).

Federal Rule of Civil Procedure 83(a)(2) states that: "[a] local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a *nonwillful* failure to comply with the requirement." FED. R. CIV. P. 83(a)(2) (emphasis added). Rule 83(a)(2)'s proscription only applies to nonwillful conduct, and not if a party "contumaciously or willfully violates a local rule." FED. R. CIV. P. 83, Advisory Committee Notes on the 1995 Amendment (1995). When a court strikes a pleading for failure to follow a local rule, repeatedly invites the party to refile the pleading to conform with local rules, and the party chooses not to do so, such noncompliance can hardly be described as "nonwillful." *See, e.g., Daily v. Municipality of Adams County*, 117 Fed. Appx. 669, 672 (10th Cir. 2004) (unpublished) (magistrate judge properly struck complaint not filed on court-approved form, where court asked plaintiff two previous times to submit complaint on proper form).

Petitioners do not make a facial invalidity claim – as they cannot – because Local Rule 7.1(b)(1) does not facially require enforcement in a manner dependent on the willfulness of a non-compliant filer.

Nor is Local Rule 7.1(b)(1) invalid as applied in this case. Local Rule 7.1(b)(1) was not enforced by the district court in a manner that caused Petitioners to lose rights, nor was Petitioners' failure to comply nonwillful. The district court enforced Local Rule 7.1(b)(1) by twice unfiling Petitioners' Extension

Motion and inviting Petitioners to re-file it in compliance with local rules by attaching a certificate of conference. The district court provided Petitioners with a Notice of Deficiency stating exactly what was missing and citing Local Rule 7.1(b)(1). The district court took no action to preclude Petitioners from making further attempts to file their Extension Motion in compliance with the local rules. The district court itself stated: "[a]t no point did the Court inform Plaintiffs that they could not file a motion to extend their response deadline (in fact, had Plaintiffs properly filed such a motion it assuredly would have been granted); it simply instructed them that the motions they did file failed to conform to the local rules of this district." Resp. App. 15. None of these actions caused Petitioners to lose rights. Petitioners fail to point to any right lost by the act of unfiling a motion without prejudice as to re-filing. The Rule 83(a)(2) inquiry could end here, as it is clear the district court did not enforce Local Rule 7.1(b)(1) in a manner that caused Petitioners to lose rights.

Yet there is a further reason why Petitioners' Rule 83(a)(2) argument fails. Namely, Local Rule 7.1(b)(1) was not enforced in a manner that could have caused a loss of rights *because of a nonwillful failure to comply*. Rule 83(a)(2) has been routinely interpreted to only apply to nonwillful failures to comply with a requirement of form. *Daily*, 117 Fed. Appx. at 671-72; *Futoma v. City of Hartford*, No. 99-7984, 2000 U.S. App. LEXIS 5768, at *2 (2d Cir. 2000) (unpublished).

It is clear from the record that Petitioners' failure to comply with the certificate of conference

requirement was willful. It was incumbent upon Petitioners to correct the deficiency in their certificate of conference and re-file their Extension Motion. If any confusion remained after the clerk's two deficiency notices, a telephone call to the clerk would have answered any question as to how to attach a certificate of conference. As the district court stated in its order, "Reasonably prudent counsel would have promptly corrected this error by re-filing the motion with a proper certificate. Plaintiffs' counsel chose not to do so, and Plaintiffs must now bear the responsibility for that decision . . ." Resp. App. 15. Petitioners chose not to correct the certificate of conference error and chose not to re-file their Extension Motion. Petitioners' failure to comply with Local Rule 7.1(b)(1) was willful. There is no violation of Federal Rule 83(a)(2) because, by its own language, Rule 83(a)(2) applies only to a nonwillful failure to comply with local rules.

Petitioners argue they were in technical compliance with Local Rule 7.1(b)(1) because buried within the body of the motion was a statement indicating that "Defendants intend to oppose Plaintiffs' Motion . . . ." Petitioners also complain that the district court granted their motion to extend a court-ordered mediation deadline, which had the same defect. These arguments are immaterial because they do not relate to Federal Rule 83(a)(2) in any manner and therefore have no bearing on the two questions presented by Petitioners' petition. These arguments do not change the fact that the district court did not cause Petitioners to lose any rights and that Petitioners' failure to comply with local rules was willful.

In addition to being immaterial to the issues presented, these two arguments are meritless in their own right. The district court rejected both arguments, explaining that certificates of conference are required to be separate statements appearing at the end of motions so that they can be easily seen by court staff, and that the court's acceptance of one deficient filing does not excuse compliance with the local rules on other filings:

> [Petitioners] point out that both of their motions did inform the Court that the motions were opposed, although they concede that they failed to file a separate certificate of conference as required by Local Rule 7.1(b). . . . The certificate of conference requirement is not a mere idle requirement intended to serve as a technical trap for unwary litigants. Rather it is designed to encourage parties to resolve disputes without requiring court intervention and to give instant notice to the court as to whether a particular motion is opposed so that it may either take action on the motion expeditiously or await a response from the opposing side. The latter function is impeded when the results of a conference are reported within the body of the motion as opposed to in a separate certificate.
>
> [Petitioners] point out that the Court granted their motion to extend the mediation deadline, filed the same day as their original Motion to Extend,

> despite the fact that such motion, like their Motion to Extend, failed to include a certificate of conference. In the motion to extend the mediation deadline, however, [Petitioners] informed the Court of [Respondents'] non-opposition on the first page of the motion as opposed to the second and third pages as done in the Motions to Extend. Thus, the Court could more easily ascertain whether the motion to extend the mediation deadline was opposed without having to read through the entire motion. In any event, simply because the Court granted one motion that did not technically comply with the local rules did not absolve [Petitioners] from complying with the local rules with respect to other motions.

Resp. App. 15-16.

II. Petitioners have not presented compelling reasons to grant the Petition, where the Fifth Circuit's unpublished decision is not in conflict with a decision of this Court or a Court of Appeals.

Petitioners contend that the Fifth Circuit's ruling is "in direct conflict" with an unpublished decision by the Third Circuit, *Construction Drilling, Inc. v. Chusid.* Petitioners' argument with respect to *Chusid* is entirely baseless. *Chusid* involved neither Local Rule 7.1(b)(1) nor Federal Rule 83(a)(2).

Chusid involved whether a New Jersey district court erred in denying *Chusid's* Rule 60(b)(6) motion, as Chusid claimed that a Texas district court's purported failure to follow its own local rules violated his due process rights by granting a motion before the 20-day deadline for filing a response. *Construction Drilling, Inc. v. Chusid*, 131 Fed. Appx. 366, 372 (3d Cir. 2005) (unpublished).[3] The Third Circuit rejected Chusid's argument and affirmed the New Jersey district court's judgment. *Id.* at 373. Petitioners' argument appears to be that because *Chusid* mentions N.D. Texas Local Rule 7.1 in some manner, even though regarding an entirely different and unrelated subsection, it has an outcome-dispositive bearing on this appeal. Petitioners' argument is so attenuated as to be non-existent. *Chusid* simply has no content regarding Local Rule

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[3] N.D. TEXAS LOCAL RULE 7.1(e) sets a 20-day deadline for a respondent to file a response and brief to an opposed motion, and has nothing to do with the certificate of conference requirement of Local Rule 7.1(b)(1).

7.1(b)(1) nor any content regarding Federal Rule 83(a)(2) and, as such, has no bearing on this case.

There is no split of authority among the circuit courts on whether Rule 83(a)(2) precludes a district court from unfiling without prejudice motions that do not comply with local rules, and requesting that the party re-file the motion in conformity with the local rules.

In conclusion, Petitioners' argument is without merit. The district court's enforcement of Local Rule 7.1(b) requiring a certificate of conference does not contravene FEDERAL RULE OF CIVIL PROCEDURE 83(a)(2). Rule 83(a)(2) requires that local rules not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement. Here, the district court took no action that caused Petitioners to lose rights, and Petitioners' failure to comply with the local rule at issue was willful. Petitioners' other arguments are immaterial to Rule 83(a)(2) and also fail in their own right. The Fifth Circuit acted well within the accepted and usual course of judicial proceedings by affirming the district court's orders unfiling without prejudice Petitioners' Extension Motions for failure to include a proper certificate of service. There is no split of authority among the circuit courts regarding any of these issues.

III. Petitioners have not presented compelling reasons to grant the Petition, where the district court's proper enforcement of a local rule is not a case of first impression meaningful enough to merit this Court's review.

Petitioners purport that this is a case of first impression because this Court has never addressed whether a district court may enforce a local rule in a manner that causes a party to lose rights contrary to Federal Rule of Civil Procedure 83(a)(2). While it may be true that this Court has never addressed this issue, it need not do so now because the instant case does not present this issue. As discussed in the previous section, the district court did not enforce Local Rule 7.1(b)(1) in a manner that caused Petitioners to lose rights, nor was Petitioners' violation of local rules nonwillful such that Rule 83(a)(2) could even be invoked.

Petitioners' own errors and self-inflicted damage to their case does not present a case of first impression to this Court, and have already cost Respondents, the Fifth Circuit, and the district court inordinate and unnecessary time and resources.

Each "loss of rights" complained of by Petitioners is attributable to their own actions. The district court granted summary judgment against Petitioners on two grounds: their deemed admissions and their failure to point to any evidence that would support a finding in their favor at trial. Both are due to Petitioners' own conduct.

Petitioners made no effort to respond, propound, or cooperate in discovery. Petitioners failed to timely respond to discovery, resulting in admissions being deemed against them as a matter of law. Although Petitioners attempted to file Extension Motions, the mere filing of an extension request does not excuse a party's discovery obligations and the consequences of failing to timely meet such discovery obligations are attributable to the party:

> The consequence for failing to meet a deadline falls upon the party who missed the deadline. A party takes a significant risk when it seeks an extension of a deadline close to the actual deadline. Such risks include: (1) that the motion will be denied so that the party will have little or no time to meet the deadline; or (2) that the party will not receive timely notice of a decision and thus will be unable to meet the deadline.

Price v. United Guar. Residential Ins. Co., 2005 U.S. Dist. LEXIS 24762, at *8-*9 (N.D. Tex. 2005) (Fish, .J.) (unpublished).

After twice failing to properly file their Extension Motion seeking more time to respond to the requests for admissions, Petitioners willfully chose not to re-file the Extension Motion. Petitioners then inexplicably waited three months to move to vacate the deemed admissions. As the district court succinctly explained, Petitioners' own willful lack of

diligence caused admissions to be deemed against them:

> Plaintiffs had admissions deemed against them not because of their failure to include a certificate of conference but rather because Plaintiffs never corrected their defective Motions to Extend to comply with the local rules and, more importantly, because Plaintiffs inexplicably waited until three months after their responses to Defendants' requests were due to move to withdraw the admissions.

Resp. App. 14-15.

Thereafter, in their motion to vacate the deemed admissions, Petitioners made no attempt to meet their burden of showing that the presentation of the merits would be promoted by having their deemed admissions withdrawn, as required in a Rule 36(b) motion to vacate. In failing to do so, Petitioners provided no grounds on which the district court could have granted their motion to vacate.

Subsequently, in response to Respondents' motion for summary judgment, Petitioners offered no evidence. Petitioners submitted no affidavits, no declarations, no deposition transcripts, no documents, no reports, nor any tangible items. As with their motion to vacate, Petitioners provided the district court with no grounds on which it could have denied Respondents' motion for summary judgment. Petitioners did not challenge any of these rulings on appeal to the Fifth Circuit.

The situation Petitioners found themselves in was entirely one of their own creation.[4] It is not the function of the courts to save litigants from themselves. *Cf. In re Pub. Offering Sec. Litig.*, 483 F.3d 70, 73 (2d Cir. 2007) (It is not appropriate for a court "to provide legal advice to experienced . . . litigators."). Petitioners' self-immolation of their own frivolous case does not present a case of first impression for this Court.

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[4] Petitioners made three attempts to submit a petition for writ of certiorari to this Court in proper form. If they gave up after the second unfiling, as they did in the district court, Petitioners would hardly be in a position to claim that the Supreme Court's Rules on the forms of writs of certiorari denied them any legal rights.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD SHARIF, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**No. 3:05-CV-1367-B**
	§	**ECF**
WELLNESS INT'L NETWORK, LTD a/k/a WIN, et al.,	§	
	§	
	§	
	§	
Defendants.	§	

ORDER

Pursuant to the District Court's order referring motion (doc. 68), Plaintiffs' Motion to Vacate Alleged Defaulted Admissions (doc. 67) has been referred to this Court for hearing, if necessary, and determination or recommendation. "In order to allow withdrawal of a deemed admission, Rule 36(b) requires that a trial court find that withdrawal or amendment: (1) would serve the presentation of the case on its merits, but (2) would not prejudice the party that obtained the admissions in its presentation of the case." *In re Carney*, 258 F.3d 415, 419 (5th Cir. 2001) (citing *American Auto Ass'n v. AAA Legal Clinic*, 930 F.2d 1117, 1119 (5th Cir. 1991)). However, "[e]ven when these two factors are established, a district court still has discretion to deny a request for leave to withdraw or amend an admission." *In re Carney*, 258 F.3d at 419 (citation

omitted). Plaintiffs have not shown that the withdrawal would serve the presentation of this case on its merits and would not prejudice the party that obtained the admissions. Therefore, the motion to vacate is DENIED.

SO ORDERED. This 12th day of April, 2007.

_____

PAUL D. STICKNEY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

RICHARD SHARIF, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**No. 3:05-CV-1367-B**
	§	
WELLNESS INT'L NETWORK, LTD a/k/a WIN, et al.,	§	
	§	
	§	
	§	
Defendants.	§	

MEMORANDUM ORDER

Before the Court are Plaintiffs' objections to the Magistrate Judge's order of April 12, 2007 denying Plaintiffs' Motion to Vacate Alleged Defaulted Admissions. Having considered the objections, record evidence, and applicable law, the Court OVERRULES Plaintiffs' objections for the reasons that follow.

I. Background

On November 20, 2006, or thereabouts, Defendants served Plaintiffs with multiple sets of requests for admission, along with other discovery requests.[1] Plaintiffs' counsel, Michael Cohen, states

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[1] Plaintiffs state that Defendants served the requests on November 20, 2006 (Objections at 1), while Defendants assert

that he received the requests on November 22, 2006 but that, at the time, he had not yet received any of Plaintiffs' documents in the case because they were in the possession of Plaintiffs' then-lead counsel of record, Robert Plotkin.[2] Accordingly, on December 20, 2006, Plaintiffs filed a motion to extend the time to respond to the discovery requests ("Motion to Extend"). The motion failed to contain either a certificate of service or a certificate of conference as required by the federal rules and the local rules of this district. See FED. R. CIV. P. 5(D); N. DIST. TEX. LOC. R. 7.1(b). On December 26, 2006, Plaintiffs separately filed a certificate of service for the motion (doc. 40).

On January 5, 2007, this Court entered an order directing the Clerk to unfile Plaintiffs' Motion to Extend on the basis that the motion did not include a certificate of conference.[3] Four days later,

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that the requests were served on November 22, 2006. (Resp. to Objections at 2).

[2] Though Plotkin was technically designated as Plaintiffs' lead counsel of record at that time, according to Plotkin, Cohen had been acting as Plaintiffs' chief counsel and had been in charge of the prosecution of this case on Plaintiffs' behalf since Cohen entered his appearance on September 15, 2006. *See* (Unopposed Combined Verified Motion and Brief of Certain Counsel to Withdraw as Counsel for Plaintiffs at 1 (doc. 56)).

[3] Plaintiffs are under the impression that the motion was unfiled because of their failure to include a certificate of conference and a certificate of service. Not so. The Notice of Deficiency indicated that the Motion to Extend was defective because of a "Failure to include certificate of service or certificate of conference". As noted, "certificate of conference" was printed in bold face type, indicating that the Motion to

on January 9, Plaintiffs filed a "renewed" motion for an extension ("Renewed Motion to Extend") which, again, failed to include a certificate of conference. Accordingly, on January 11, 2007 the Court entered a second order directing the Clerk to strike the pleading from the docket for failure to include a certificate of conference. This time Plaintiffs made no effort to re-file the motion. By letter dated January 16, 2007, Defendants informed Plaintiffs of their position that all of the requests for admissions served on Plaintiffs had been deemed admitted under Rule 36(a). See (Pls.' Resp. to Defs.' Status Reports at Ex. 2 (doc. 66)). Over two months later, on March 22, 2007, Plaintiffs filed a Motion to Vacate Alleged Defaulted Admissions ("Motion to Vacate"). The Court referred the motion to Magistrate Judge Paul Stickney on March 23. Defendants filed their response to the motion on March 28. Plaintiffs did not file a reply brief.

On April 12, 2007, Magistrate Judge Stickney entered an order denying Plaintiffs' Motion to Vacate on the basis that Plaintiffs failed to show that the withdrawal of the admissions would serve the presentation of the case on the merits and would not prejudice the party that obtained the admissions. Plaintiffs filed their objections to the Magistrate Judge's ruling on April 22, 2007. Defendants responded to the objections on May 2, 2007.

Extend was stricken for failure to include a certificate of conference, as required by Local Rule 7.1(b).

II. Analysis

A. Legal Standard for Reviewing Objections to a Magistrate Judge's Order

Under Rule 72(a) of the Federal Rules of Civil Procedure, a district court may modify or set aside a Magistrate Judge's ruling on a nondispositive pretrial motion if the ruling is "clearly erroneous or contrary to law." FED. R. CIV. P. 72(a); 28 U.S.C. § 636(b)(1(A); *Castillo v. Frank*, 70 F.3d 382, 385 (5 Cir. 1995). A district court should overrule a Magistrate Judge's ruling only when it is "left with the definite and firm conviction that a mistake has been committed." *Concrete Pipe & Prods. of California, Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622 (1993). The Fifth Circuit has held that a party objecting to a Magistrate Judge's ruling waives legal arguments not initially raised before the Magistrate Judge. See *Cupit v. Whitley*, 28 F.3d 532, 535 (5th Cir.1994).

B. Legal Standards for Withdrawing Deemed Admissions

Under Rule 36(a) of the Federal Rules of Civil Procedure, a matter in a request for admission is deemed admitted unless the party to whom the request is directed answers or objects to the request within 30 days of service of the request. FED. R. CIV. P. 36(a). A deemed admission can only be withdrawn or amended in accordance with Rule 36(b). *See* In re *Carney*, 258 F.3d 415, 419 (5th Cir. 2001). That is, the trial court must find that the withdrawal or amendment "1) would serve the presentation of the

case on the merits, but 2) would not prejudice the party that obtained the admissions in its presentation of the case." *Id.*; FED. R. CIV. P. 36(b). Even when both factors are satisfied, a district court may still, in its discretion, deny a request to withdraw or amend an omission. *Id.* The district court's decision in that regard is reviewed under an abuse of discretion standard. *SeeLe v. The Cheesecake Factory Rests. Inc.*, 2007 WL 715260, at *2 (5th Cir. March 6, 2007).

C. Plaintiffs' Objections

Plaintiffs essentially advance three arguments in their objections as to why the Magistrate Judge's decision should be overturned. First, they argue that the presentation of the merits of their case will be subserved if the Court allows the deemed admissions to be withdrawn.[4] Second, they maintain that Defendants have failed to show that the withdrawal of the admissions will prejudice their defense. Third, Plaintiffs contend that the unfiling of their original motion for an extension of time to respond to Defendants' requests for admission was due to "excusable inadvertence" and should not serve as a basis for deeming matters admitted.

The problem is that Plaintiffs failed to raise the first two of these arguments – the ones which truly matter under Rule 36(b) and Fifth Circuit

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[4] The Court presumes that Plaintiffs mistakenly stated in their objections that the presentation of the merits of their case would be served if the withdrawal of their admissions "is *not* permitted." (Objections at 5) (emphasis added).

authority – before the Magistrate Judge. In their Motion to Vacate Plaintiffs only advanced two reasons why their defaulted admissions should not be deemed admitted: first, because there was no court order finding them to be deemed admitted; and second, because the record showed that Plaintiffs had actually filed a certificate of service with respect to their original Motion to Extend prior to this Court's unfiling of that motion.[5] (Mot. To Vacate at 3). Though Plaintiffs recited the requirements of Rule 36(b) in their Motion to Vacate, they failed to explain or offer any argument as to how the withdrawal of the deemed admissions would serve the presentation of the case on the merits or would not prejudice Defendants. Plaintiffs' failure to address those matters were the reasons for the Magistrate Judge's denial of their Motion to Vacate. Plaintiffs now attempt to remedy their error by discussing the Rule 36(b) factors for the first time in their objections. Because Plaintiffs are not entitled to raise new theories or arguments in their objections that were not presented before the Magistrate Judge,

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[5] Incidentally, the first of these arguments is legally incorrect, the second factually so. Plaintiffs have abandoned the former argument in their objections, presumably because they came to realize that Rule 36 is "self-executing; no court intervention is required for an admission to be established." *See Curtis v. State Farm Lloyds*, 2004 WL 1621700, at *4 (S.D. Tex. April 29, 2004). The latter argument is factually incorrect because Plaintiffs' initial Motion to Extend was not unfiled for failure to include a certificate of service, but rather because, as explained *supra* at n. 2, the motion failed to include a certificate of conference. Neither Plaintiffs' Motion to Extend nor their Renewed Motion to Extend contained a certificate of conference as required by Local Rule 7.1(b).

those arguments have been waived. *See Cupit*, 28 F.3d at 535.

Plaintiffs' objections to the Magistrate Judge's ruling fail on the merits even if they have not been waived. For starters, Plaintiffs still fail to put forth any arguments, much less any evidence, establishing that the presentation of their case on the merits will be served by allowing the withdrawal of their deemed admissions. Instead Plaintiffs simply offer conclusory statements, such as that the admissions at issue "clearly go to the core of Plaintiffs' case" and that "[t]hese central facts go to the core of Defendants' liability[.]" (Objections at 6). Plaintiffs fail to identify a single request the admission of which would hamper the presentation of their case on the merits. Nor have they so much as attached a copy of the admissions at issue to either their Motion to Vacate or their objections. Indeed, they failed to offer any evidence at all, making it difficult to meet their burden to show that the presentation of their case on the merits would be served by a withdrawal. *See Le*, 2007 WL 715260, at * 2 ("Even where the presentation of the merits of a case would be eliminated, other factors considered are whether the plaintiff has demonstrated that the merits would be served *by advancing evidence* showing 'the admission is contrary to the record of the case,' or that the admission 'is no longer true because of changed circumstances or [that] through an honest error a party has made an improvident admission.'") (quoting *N. Louisiana Rehab. Ctr. v. United States*, 179 F.Supp.2d 658, 663 (W.D. La. 2001)) (emphasis added); *Branch Banking and Trust Co. v. Deutz-Allis Corp.*, 120 F.R.D. 655, 658-59 (E.D.N.C. 1988)

denying withdrawal where there was "no affidavit, verified pleading, or other evidence at bar to suggest the admission, if left standing, would render an unjust result under the law.").

Plaintiffs instead argue that admissions on "central facts" are not permitted by Rule 36. Plaintiffs partly rely on the Fifth Circuit's statement in *Pickens v. Equitable Life Assurance Society* that "requests for admissions as to central facts in dispute are beyond the proper scope of the rule." 413 F.2d 1390, 1394 (5th Cir. 1969). *Pickens*, however, was decided prior to the 1970 amendments to Rule 36.[6] "The 1970 amendment explicitly favors the principle that *any* matter admitted under the rule is conclusively established unless the court in its discretion permits withdrawal." *Fed. Trade Comm'n v. H.N. Singer, Inc.*, 1982 WL 1907, at *2 (N.D. Cal. Oct. 26, 1982) (emphasis in original); Fed. R. Civ. P. 36 advisory committee's note ("Admissions are sought, first to facilitate proof with respect to issues that cannot be eliminated from the case, and secondly, to narrow the issues by eliminating those that can be."); 8A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2254 (2d ed. 1994) (stating that there is no basis in Rule 36 for the notion that the rule is not designed to be used to cover the entire case and every piece of evidence). Since *Pickens*, Fifth Circuit cases make clear that "Rule 36 allows litigants to request admissions as to a broad range of matters, *including ultimate facts*, as well as applications of law to fact." *Carney*, 258 F.3d at 419 (emphasis added); *Le v. The*

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[6] Because of this, the Fifth Circuit has expressly noted that *Pickens* "cannot be relied upon in its entirety." *Le*, 2007 WL 715260, at *2 n.2.

Cheesecake Factory Rests., Inc., 2005 WL 2266610, at * 6 (S.D. Tex. Sept. 14, 2005) ("[W]hile it may be the case that the Plaintiffs' admission in this case may completely free [Defendant] of liability, Plaintiffs have nevertheless not competently pointed to existing facts in the record which contradict such admissions, they do not detail how such admissions are no longer true, or detail how the admissions were a mistake."); *see also Branch Banking and Trust Co.*, 120 F.R.D. at 658 ("Clearly, a request for admission is not improper merely because it relates to an 'ultimate fact' or to an issue of fact that is dispositive of one aspect of the case.").

Next Plaintiffs argue that Defendants have failed to demonstrate that withdrawal of the deemed admissions will prejudice their defense of this case. Plaintiffs complain that Magistrate Judge Stickney improperly placed the burden on them to show that withdrawal would not result in prejudice to Defendants. Rule 36(b) provides that the court may allow the withdrawal of admissions if the presentation of the merits will be subserved thereby "and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits." FED. R. CIV. P. 36(b). Although, in this case, the rule does place the onus on the Defendants to show that a withdrawal of the admissions will work to their prejudice, *see Coca-Cola Bottling Co. v. Coca-Cola Co.*, 123 F.R.D. 97, 102 (D. Del. 1988), Plaintiffs' representation that Defendants have never argued that they would be prejudiced by a withdrawal is simply false. (Objections at 3). In fact, Defendants' response to

Plaintiffs' Motion to Vacate devoted an entire section to the prejudice issue. There Defendants argued that a withdrawal of the deemed admissions would frustrate their efforts to secure discovery and to prepare their defense in this case given the imminence of the May 11, 2007 discovery deadline.

"Courts have usually found that the prejudice contemplated by Rule 36(b) relates to special difficulties a party may face caused by a sudden need to obtain evidence upon withdrawal or amendment of an admission." *Am. Auto Ass'n v. AAA Legal Clinic*, 930 F.2d 1117, 1120 (5th Cir. 1991). The Fifth Circuit has recognized that other courts have concluded that the type of prejudice envisioned by the rule does not include the mere fact that the proponent of the admissions may actually need to prove the matters deemed admitted or that obtaining such proof will result in additional expenses. *See Le*, 2007 WL 715260, at *3 (citing *Gutting v. Falstaff Brewing Corp.*, 710 F.2d 1309, 1314 (8th Cir. 1983); *N. Louisiana Rehab. Ctr.*, 179 F.Supp.2d at 663). But the Fifth Circuit has also acknowledged that courts have considered "within the prejudice analysis, the timing of the motion for withdrawal as it relates to the diligence of the party seeking withdrawal and the adequacy of time remaining for additional discovery before trial." *Id.* (citing *Branch Banking and Trust Co.*, 120 F.R.D. at 660 (denying withdrawal where party could have obtained information needed to respond to requests for admissions had it exercised diligence) and *N. Louisiana Rehab. Ctr.*, 179 F.Supp.2d at 663 (allowing withdrawal where adequate time remained before trial to conduct limited discovery)).

Plaintiffs here can hardly be said to have been diligent in moving for the withdrawal of the deemed admissions. True, Plaintiffs initially filed a motion to extend the deadline for responding Defendants' requests for admissions back in December 2006. That motion was unfiled, however, for failure to include a certificate of conference, an error which, one would think, is easily curable. Evidently not for Plaintiffs, as the "renewed" motion they filed in early January 2007 also failed to include a certificate of conference. Consequently, the Court unfiled it. Rather than immediately re-filing their motion to extend with, say, a certificate of conference[7], Plaintiffs, as Defendants aptly put it, simply gave up on the matter. Not until over two months later, on March 22, 2007, did Plaintiffs file a motion to vacate the deemed admissions, at a time when the May 11, 2007 discovery deadline was fast approaching. Plaintiffs fail to explain why they waited over three months after their admissions were deemed admitted to finally move to withdraw them. Without explicitly saying so, Plaintiffs suggest that the delay occurred because they first learned that Defendants' requests were deemed admitted on March 19, 2007, when Defendants filed a status report indicating as much. (Objections at 3). Any such argument fails to hold water. First, Defendants are not obligated to provide

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[7] If Plaintiffs' counsel, who is from Illinois, was unclear as to what a certificate of conference was, he could have simply called the Court to find out or consulted with Plaintiffs' own local counsel, who, as earlier filings show, knew how to file motion papers with a certificate of conference. *See e.g.* (Plaintiffs' Unopposed Motion to Stay this Proceeding Pending the Outcome of an Appeal Currently Pending in the United States Court of Appeals for the Seventh Circuit (doc. 22)).

Plaintiffs' counsel with a tutorial on the federal rules. Second, Defendants did, in fact, advise Plaintiffs of their position with respect to the deemed admissions as early as January 16, 2007. *See* (Pls.' Resp. to Defs.' Status Report at Ex. 2 (doc. 66)). Third, Plaintiffs were obviously aware that certain consequences would follow from their failure to timely respond to Defendants' discovery requests, otherwise they would not have moved for an extension to file their responses. Plaintiffs have thus failed to demonstrate that they acted with diligence in moving for the withdrawal of their deemed admissions.

The Court also finds that the withdrawal of the admissions would have left Defendants without adequate time to conduct discovery. Plaintiffs did not file their Motion to Vacate until March 22, 2007. Defendants filed their response on March 28, 2007. Thus, the motion was not even ripe for ruling until April 12, 2007, the same day that the Magistrate Judge denied the motion. Had the Magistrate Judge allowed withdrawal at that point, less than one month would have been left for Defendants to conduct discovery in the case. Defendants clearly would have been prejudiced had they been forced to conduct discovery in such a short time frame.

Finally, the Court addresses Plaintiffs' contention that such a venial misstep as their failure to attach a certificate of conference to their motions to extend the time to respond to Defendants' discovery requests should not serve as a basis for having Defendants' requests for admissions deemed admitted. Plaintiffs miss the point. Plaintiffs had

admissions deemed against them not because of their failure to include a certificate of conference but rather because Plaintiffs never corrected their defective Motions to Extend to comply with the local rules and, more importantly, because Plaintiffs inexplicably waited until three months after their responses to Defendants' requests were due to move to withdraw the admissions. At no point did the Court inform Plaintiffs that they could *not* file a motion to extend their response deadline (in fact, had Plaintiffs properly filed such a motion it assuredly would have been granted); it simply instructed them that the motions they did file failed to conform to the local rules of this district. Reasonably prudent counsel would have promptly corrected this error by re-filing the motion with a proper certificate. Plaintiffs' counsel chose not to do so, and Plaintiffs must now bear the responsibility for that decision and for their own lack of diligence in ultimately moving to vacate their deemed admissions.

The Court will briefly address Plaintiffs' technical quibbles with the Court's unfiling of their Motions to Extend. First, Plaintiffs point out that both of their motions did inform the Court that the motions were opposed, although they concede that they failed to file a separate certificate of conference as required by Local Rule 7.1(b). (Objections at 10). The certificate of conference requirement is not a mere idle requirement intended to serve as a technical trap for unwary litigants. Rather it is designed to encourage parties to resolve disputes without requiring court intervention and to give instant notice to the court as to whether a particular motion is opposed so that it may either take action

on the motion expeditiously or await a response from the opposing side. The latter function is impeded when the results of a conference are reported within the body of the motion as opposed to in a separate certificate.

Plaintiffs point out that the Court granted their motion to extend the mediation deadline, filed the same day as their original Motion to Extend, despite the fact that such motion, like their Motion to Extend, failed to include a certificate of conference. In the motion to extend the mediation deadline, however, Plaintiffs informed the Court of Defendants' non-opposition on the first page of the motion as opposed to the second and third pages as done in the Motions to Extend. Thus, the Court could more easily ascertain whether the motion to extend the mediation deadline was opposed without having to read through the entire motion. In any event, simply because the Court granted one motion that did not technically comply with the local rules did not absolve Plaintiffs from complying with the local rules with respect to other motions.

III. Conclusion

For the foregoing reasons, the Court finds that Plaintiffs have failed to show that the Magistrate Judge's April 12, 2007 order was clearly erroneous or contrary to law. Plaintiffs' objections to the Magistrate Judge's order are accordingly OVERRULED.

SO ORDERED and. SIGNED May 7th, 2007.

JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD SHARIF. et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**No. 3:05-CV-1367-B**
	§	**ECF**
WELLNESS INT'L	§	
NETWORK, LTD a/k/a WIN,	§	
et al.,	§	
	§	
Defendants.	§	

MEMORANDUM ORDER

Before the Court is Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 9(b), 12(b)(1)[1], and 12(b)(6). For the reasons that follow, the Court GRANTS the motion in part and 1 DENIES it in part.

I. Background

This suit arises from distributorship contracts that Plaintiffs signed with Wellness International Network, Ltd. ("WIN" or "Wellness"), an entity which

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[1] Despite the title of Defendant's motion, Defendants actually make no argument that this Court lacks subject matter jurisdiction over this case under Rule 12(b)(1), Federal Rules of Civil Procedure. Accordingly, the Court will not address Rule 12(b)(1) in this order.

purports to be a multi-level marketing operation that sells and distributes health and wellness products. (Compl. ¶ 24). Plaintiffs charge that WIN, in actuality, is nothing more than an illegal pyramid scheme. Defendant Ralph Oats is the founder of Wellness and the president of WIN Network, Inc. ("WINNI"), WIN's Managing General Partner. (Compl. ¶¶ 19-20). Oats is a regular host of seminars aimed to recruit distributors into the WIN network. (*Id.* at ¶ 20). Defendant Cathy Oats, Ralph's wife, is Secretary of WINNI and also speaks at various seminars and presentations to help sell the WIN system. (*Id.* at ¶ 21). Defendant Sherri Matthews is WIN's Director of Distributor Relations and, according to Plaintiffs, "an important official in the implementation of the Wellness scheme[.]" (*Id.* at ¶ 22).

Plaintiffs allege that they were lured into signing distributorship contracts with WIN after attending one or more seminars hosted by Ralph Oats in Chicago and/or Dallas. Plaintiffs claim that at these presentations Ralph Oats made various misrepresentations about the nature of the WIN system, among them being that WIN distributors made tens of thousands of dollars per month, that WIN was a "hands-on" company that genuinely cared about its distributors, and that WIN was not a pyramid scheme and was "perfectly legal". (*Id.* at ¶ 27). Plaintiffs also say that Oats neglected to mention at the time that each distributor would be required to pay thousands of dollars each month to "qualify" for bonuses and commissions. (*Id.*). Plaintiffs allege that they decided to sign contracts with WIN based on statements made by WIN

distributors who recruited them, statements that Ralph and Cathy Oats made at WIN presentations, and statements made in WIN literature. (*Id.* At ¶ 7). Plaintiffs Richard Sharif, Abdul and Shaheen Rashid, and Waqar and Shafqut Khan each signed WIN associate application or distributorship agreements in May 1999, December 1999, and June 2000, respectively. (*Id.* at ¶¶ 6, 71(f), 71(e)).

Plaintiffs complain that the WIN system has been operated as a classic pyramid scheme from its inception. That is, Plaintiffs allege that commissions in the system are measured, not from the actual sale of product, but rather by the number of other persons they recruit into the scheme. (*Id.* at ¶ 49). Plaintiffs claim that the pyramid structure of WIN is evidenced by their own experiences. They point out, for example, that the Rachids were hailed in WIN's quarterly newsletter for the first quarter 2000 as "Top Newcomers" for November 1999 "Based on Personal Group Retail Sales Volume in their Qualifying Month"; this despite the fact that the Rashids did not even sign their distributorship contract until December 1999, and they in fact never sold any WIN products. (*Id.* at ¶ 36). Likewise, Khan was listed in the fourth quarter 2000 edition of the newsletter as a "Top Monthly Producer" for June 2000, but he had just signed the WIN contract on June 18, 2000, and, like the Rachids, he had not actually sold any product at that time – all he had done was pay Wellness over $242,000. (*Id.* at ¶ 37). Plaintiffs also allege that WIN took legal action to stop Sharif from advertising WIN's products on the internet and was chastised by Sherri Matthews when

he sold a small amount of the product from his pharmacy. (*Id.* at ¶¶ 57-58).

Plaintiffs claim that these experiences are simply emblematic of the fact that the true objective of the WIN operation is to expand the allegedly illegal pyramid as opposed to selling health products. Sharif, the Khans, and the Rashids each claim to have lost their entire investments – amounting to $424,803.06, $266,400, and $239,000, respectively – in the WIN operation, plus additional storage costs and other expenses. (*Id.* at ¶¶ 9, 13, 17).

In April 2002 Richard and Souzan Sharif filed suit against the WIN Defendants and others in the United States District Court for the Northern District of Illinois, alleging violations of RICO. The Sharifs later filed an amended complaint adding claims for violations of federal securities law, the Illinois Consumer Fraud Act, fraud, and civil conspiracy, among other claims. In August 2002, the Rashids, the Khans, and others brought a separate suit in the Northern District of Illinois against the Wellness Defendants asserting the same claims as the Sharifs. The two actions were consolidated, and the Illinois district court ultimately dismissed the case without prejudice on December 2, 2004[2] pursuant to forum selection clauses contained in Plaintiffs' distributorship agreements mandating that jurisdiction and venue over any disputes arising out of those agreements be litigated in Dallas

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[2] Plaintiffs filed a motion for reconsideration, which was denied on May 10, 2005. (Defs.' App. 263- 272).

County, Texas. Plaintiffs appealed the ruling to the Seventh Circuit.

While the appeal was pending, on July 8, 2005 Plaintiffs filed the instant case against the Wellness Defendants in this Court, asserting violations of the Texas Deceptive Trade Practices Act ("DTPA") and RICO and common law claims for fraud and civil conspiracy. Upon motion of the parties the Court stayed the case pending the Seventh Circuit's resolution of the Illinois appeal. On February 17, 2006 the Seventh Circuit affirmed the district court's ruling that the proper forum for the action was in Dallas County. After the parties notified this Court of the Seventh Circuit's decision, the Court lifted the stay in this case on July 27, 2006.

II. Analysis

A. Legal Standard

Motions to dismiss under Rule 12(b)(6) are disfavored and rarely granted. *Kaiser Aluminum& Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5 Cir. 1982). The Court liberally construes the complaint in the plaintiff's favor, and all pleaded facts are taken as true. *Campbell v. Wells Fargo Bank, N.A.*, 781 F.2d 440, 442 (5 Cir. 1986). Unless it appears beyond doubt that the plaintiff cannot prove any set of facts entitling it to relief, the complaint should not be dismissed. *Conley v. Gibson*, 355 U.S. 42, 45 (1957).

B. Standing of Soad Wattar, Haifa Kaj and Ragda Sharifeh

In their motion to dismiss Defendants initially challenge the standing of Wattar, Kaj, and Sharifeh (the "nominal plaintiffs") as "plaintiffs" in this case. Plaintiffs failed to address Defendants' challenge in its response brief. It is doubtful whether the nominal plaintiffs are even plaintiffs at all. The complaint alleges only that they "are all family members of Mr. Sharif and provided Mr. Sharif with the monies which were paid to the defendants in this case"(Compl. ¶ 6), and the caption of the complaint suggests that Sharif is appearing in this case as the nominal plaintiffs' agent. There are no allegations that the nominal plaintiffs entered into any contracts with WIN or that any of the WIN Defendants personally wronged them in any way. In short, the Court finds that to the extent the nominal plaintiffs are attempting to assert claims against the Defendants in their individual capacities, such claims should be dismissed for failure to state a claim.

C. Contractual Limitations

Defendants argue that Plaintiffs agreed in the WIN contracts they signed not to sue the Individual Defendants and to limit the liability of WIN and its related parties to unsold product inventory. Even if the Court assumes that the WIN agreements are valid and enforceable, those agreements do not bar extracontractual claims against the Individual Defendants. *See Budner v. Wellness Int'l Network, Ltd.*, 2007 WL 806642, at *8 (N.D. Tex. March 15, 2007). Moreover, under Texas law "a party cannot prospectively insulate itself contractually from

liability for intentional torts." *Id.* (citing *Solis v. Evans*, 951 S.W.2d 44, 50 (Tex. App. – Corpus Christi 1997, no writ)). The Court thus denies Defendants' motion to dismiss Plaintiffs' claims on contractual grounds.

D. Claims Against the Individual Defendants and WINNI

1. Sherri Matthews

Defendants claim that Plaintiffs' complaint fails to state a claim against Defendants Sherri Matthews, Cathy Oats, Ralph Oats, or WINNI. Plaintiffs merely allege that Matthews is WIN's Director of Distributor Relations and Compliance, that she was and is "an important official in the implementation of the Wellness scheme", and that she "was the official who dealt with the complaints of the plaintiffs and other distributors and was responsible for denying the refund requests of the plaintiffs." (Compl. ¶ 22). Plaintiffs fail to describe even in general terms Matthews's role in connection with their fraud, RICO, or conspiracy claims. Accordingly, the Court finds that Plaintiffs' claims against Matthews should be dismissed with prejudice.

2. Cathy Oats

The only specific allegations of wrongdoing that Plaintiffs make against Cathy Oats is that she made certain unidentified "statements" at presentations attended by Plaintiffs on which Plaintiffs allegedly relied. (Compl. ¶¶ 7, 11, 15). Rule

9(b) elevates the federal rules' liberal pleading standards to require plaintiffs to plead the circumstances constituting fraud with particularity. FED. R. CIV. P. 9(b). To satisfy 9(b)'s pleading requirements in the Fifth Circuit, plaintiffs must "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *Southland Sec. Corp. v. Inspire Ins. Solutions*, 365 F.3d 353, 362 (5 Cir. 2004) (quoting *Williams v. WMX Technologies, Inc.*, 112 F.3d 175, 177-78 (5 Cir. 1997)); *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998) (to prevail on a fraud claim under Texas law, plaintiff must establish, among other things, that the defendant made a material misrepresentation, which was false, and which the defendant either knew was false when made or made it recklessly without knowledge of its truth). Notably, Plaintiffs fail to allege the time, place and contents of the representations purportedly made by Cathy Oats or even allege that the representations were false in any way or that she knew they were false when made. Accordingly, Plaintiffs' claims against Cathy Oats should be dismissed for failure to plead with particularity.

3. Ralph Oats

Defendants next argue that Plaintiffs have failed to state a claim for relief against Ralph Oats, WIN's president. Plaintiffs allege that the following allegations sufficiently state a claim of fraud against Ralph Oats, each of which the Court will address in turn:

- **27. Each of the plaintiffs attended presentations hosted by defendants Ralph and Cathy Oats, including presentations given by Ralph Oats at the Multi-Level Marketing College (the "MLM College") in Dallas, Texas. At all of these presentations, Ralph Oats made similar misrepresentations. Among these misrepresentations were the following:**

  a) Wellness distributors made tens of thousands of dollars each month. In this connection, Oats would choose people out of the audience who would then stand up and tell the members of the audience that they were earning anywhere from $10,000 to $120,000 each month; (Compl. ¶ 27(a)).

First, this allegation merely states that certain unidentified speakers made statements as to the amount of money they made. It does not allege that Ralph Oats made the statements himself or that the speakers made the statements at Oats's behest. Second, Plaintiffs fail to adequately explain how such statements were fraudulent. All Plaintiffs say is that they "believe" that the speakers "did not earn anywhere near the amounts they touted to the audience, and all of these amounts, if made were made from unlawful activity in violation of Texas law." (Compl. ¶ 34). Allegations that a plaintiff merely "believes" a representation to be false must at

the very least state with particularity the facts on which such belief is formed. *See Rombach v. Chang*, 355 F.3d 164, 172 (2 Cir. 2004) (quotations and citation omitted) (to satisfy Rule 9(b) complaint must "state with particularity the specific facts in support of [plaintiffs'] belief that [defendants'] statements were false when made"). Plaintiffs have failed to do so.

- **b) Wellness was a "hands-on" company that cared about its distributors and that distributors would receive all of the guidance and assistance necessary to make the plaintiffs successful; (Compl. ¶ 27(b)).**

This allegation fails to state a claim against Oats because Plaintiffs fail to identify any allegation in their complaint stating that this alleged representation was false or how it was fraudulent.

- **c) Oats omitted any mention of the need for each distributor to pay thousands of dollars each month in order to "qualify" for bonus and commissions; (Compl. ¶ 27(c)).**

"Where an omission is alleged to be fraudulent, the pleader must plead the time and place the disclosure(s) should have been made, under what authority such a disclosure is required, and how the omission made the representation misleading." *Siemens Med. Solutions USA, Inc. v. Sunrise Med. Technology, Inc.*, 2005 WL 615747, at

*4 (N.D. Tex. March 16, 2005) (citing *United States ex rel. Riley v. St. Luke's Episcopal Hosp.*, 355 F.3d 370, 381 (5 Cir. 2004)). Under Texas law there is a "duty to disclose only where a fiduciary or confidential relationship exists." *Id.* (quoting *Bay Colony, Ltd. v. Trendmaker, Inc.*, 121 F.3d 998, 1004 (5 Cir. 1997)). Plaintiffs nowhere plead that a special relationship existed between Plaintiffs and Ralph Oats which would impose upon Oats an obligation to disclose payment requirements for WIN's distributors. Accordingly, the Court finds that Plaintiffs have failed to state a fraud claim against Oats with respect to this statement.

- **d) Wellness was not a pyramid scheme and was perfectly legal.**

Defendants contend that this statement is not actionable because it is merely a statement of opinion about a legal matter, which is not actionable under Texas law. However, one of the cases Defendants cite, *Fina Supply, Inc. v. Abilene Nat'l Bank*, 726 S.W.2d 537, 540 (Tex. 1987), states that

> There are certain exceptions to the general rule that misrepresentations involving a point of law or the legal effect of a document will not support an action for fraud. These exceptions embody a recognition that in certain circumstances a statement of opinion can rise to the level of fraud. A party having superior knowledge, who takes advantage of another's ignorance of the law to deceive him by studied concealment or misrepresentation, can be held responsible for this conduct. Relief may also be

> granted for misrepresentation as to a point of law or of legal rights where there is a fiduciary or confidential relationship of trust between the parties. Additionally, misrepresentations involving a point of law will be considered misrepresentations of fact if they were intended and understood as such.

Id. at 540. In this case it is possible that Plaintiffs can show that Oats had superior knowledge regarding the legality of WIN's operations and intended to take advantage of Plaintiffs' ignorance in legal matters. It is also conceivable that Oats's alleged statement may be considered a misrepresentation of fact if he intended it to be, and it was, understood as such. Accordingly, because it does not appear beyond doubt that Plaintiffs cannot prove any set of facts entitling them to relief with respect to this statement, the Court finds that the complaint should not be dismissed as to Oats in its entirety.

4. WINNI

Defendants claim that Plaintiffs' complaint fails to explain why WINNI is a defendant in this action. Plaintiffs allege that WINNI is the Managing General Partner of WIN, a limited partnership. (Compl. ¶ 19). Under Texas law general partners are jointly and severally liable with the limited partnership for the obligations of the partnership. *See* TEX. REV. CIV. STAT. ANN. art. 6132a-1 § 4.03; *Shaw v. Kennedy, Ltd.*, 879 S.W.2d 240, 247 (Tex. App. – Amarillo 1994, no pet.). WINNI is thus a proper party in this case.

E. Plaintiffs' Standing as "Consumers" Under the DTPA

To maintain a cause of action under the DTPA, Plaintiffs must establish that: (1) they are consumers under the DTPA with respect to their claim against Defendants; (2) Defendants committed a false, misleading, or deceptive act under § 17.46(b) of the DTPA, breached an express or implied warranty, or engaged in an unconscionable action or course of action; and (3) these acts were the producing cause of their damages. *See Brittan Communications v. Southwestern Bell Tel. Co.*, 313 F.3d 899, 907 (5 Cir. 2002). Defendants contend that Plaintiffs cannot meet the first element because they "do not allege any problem or defect with any goods purchased from Wellness." (Defs.' Mot. 17). A "consumer" is defined under the DTPA as "an individual, partnership, [or] corporation . . . who seeks or acquires by purchase or lease, any goods or services[.]" TEX. BUS. & COM. CODE § 17.45(4). To have standing to sue under the DTPA Plaintiffs must (1) have sought or acquired goods or services by purchase or lease; and (2) the goods or services purchased or leased must form the basis of the complaint." *Brittan*, 313 F.3d at 907. The DTPA defines "goods" as "tangible chattels or real property purchased or leased for use." TEX. BUS. & COM. CODE § 17.45(1). The defendant's deceptive conduct must have occurred "in connection with" a consumer transaction for liability to attach under the DTPA. *See Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 649 (Tex. 1996).

Plaintiffs allege in their complaint that they were required to make significant ongoing purchases of Wellness products in order to earn the types of returns promised by Defendants. The purchased inventory would then be sold downline to new recruits. *See e.g.* (Compl. ¶ 8) ("distributors were required to purchase thousands of dollars of additional products from Wellness each month – regardless of whether they had sold any of the products in their possession."); (Compl. ¶ 60) ("[T]he only way for a distributor to dispose of his or her products is to recruit new distributors by stressing the opportunity."). Plaintiffs have thus sufficiently alleged that they "acquired goods" – the WIN products – "by purchase", thus meeting the first standing requirement. Plaintiffs also meet the second because, although they do not necessarily allege that the products were defective,[3] they do sufficiently allege that Defendants duped them into buying them in the first place by leading them to believe that the end result was to sell them to consumers as opposed to being passed on to downline recruits. The Court thus finds that Plaintiffs have standing to sue under the DTPA because they allege deceptive conduct on the part of Defendants "in connection with" a consumer transaction. *Cf. Millar v. Sexton*, 2002 WL 1981391 (Tex. App. – Dallas Aug. 29, 2002, no pet.) (affirming trial court's judgment that organizers violated § 17.46(21) by setting up pyramid scheme).

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[3] Plaintiffs do complain, however, that WIN routinely shipped products to distributors that had 3 expired "use by dates" on them and denied requests by distributors to send fresh products. (Compl. ¶ 59).

Section 17.461 of the DTPA makes it a state jail felony offense if a person "contrives, prepares, establishes, operates, advertises, sells, or promotes a pyramid promotional scheme." TEX. BUS. & COM. CODE § 17.461(c). Defendants are correct in saying that § 17.461 does not create a private right of action. However, § 17.50(a)(1)(A) provides that a consumer may maintain an action when a person engages in a false, misleading, or deceptive act or practice that is listed in § 17.46(b). Section 17.46's "laundry list" of "false, misleading, or deceptive acts or practices" includes "promoting a pyramid promotional scheme, as defined by Section 17.461." TEX. BUS. & COM. CODE § 17.46(b)(21). Plaintiffs may thus bring a private right of action under sections 17.46 and 17.50 based on allegations that Defendants promoted an unlawful pyramid scheme.

F. Failure to State a DTPA Claim

Defendants also contend that Plaintiffs have included no factual allegations in their complaint that WIN is an unlawful pyramid scheme. The DTPA defines a "pyramid promotional scheme" as a "plan or operation by which a person gives consideration for the opportunity to receive compensation that is derived primarily from a person's introduction of other persons to participate in the plan or operation rather than from the sale of a product by a person introduced into the plan or operation." TEX. BUS. & COM. CODE § 17.461(a)(6). Plaintiffs' complaint clearly alleges such a scheme. Plaintiffs specifically allege, for example, that when describing WIN in a video presentation, Ralph Oats made statements such as: "We are not about selling"; "Now every time

you bring a person into the business, you have to understand, that six people are going to earn on what that person did"; and that "I am telling you that all of you who are [holding product information meetings] are guilty as sin of getting yourself set up in a product business . . . but you are not recruiting anybody and I will tell you why you are not recruiting anybody[.]" (Compl. ¶¶ 51-53). Plaintiffs also allege that "[t]he real objective of the defendants' scheme is pyramiding and not the sale or distribution of their products, which is also shown by the fact that Wellness solicits and accepts as distributors persons who have no basis or structure for retailing Wellness products." (Compl. ¶ 55). Plaintiffs have sufficiently stated a DTPA violation.

G. RICO Claims

Plaintiffs claim that Defendants violated subsections (a)-(d) of 18 U.S.C. § 1962 of the RICO statute. A Plaintiff properly asserts a RICO claim where it is shown that (1) a person engages in (2) a pattern of racketeering activity that is (3) connected to the acquisition, establishment, conduct, or control of an enterprise. *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 439 (5th Cir. 2000). A "person" under RICO is the defendant that committed the RICO violations and can be "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3); *St. Paul*, 224 F.3d at 440. "Racketeering activity" includes certain state and federal offenses listed in § 1961(1). *Kwan-Tai Corp. v. Mastercraft Printers, Inc.*, 2001 WL 487329, at *4 (E.D. La. May 7, 2001). The individual acts of racketeering are commonly

described as the "predicate" acts or offenses. *Id.* Predicate acts include instances of mail and wire fraud. *Tel-Phonic Serv., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138 (5 Cir. 1992). An "enterprise" is broadly defined by the act, and it "can be either a legal entity or an association-in-fact." 18 U.S.C. § 1961(4); *St. Paul*, 224 F.3d at 440.

1. Plaintiffs Have Not Pleaded Predicate Acts With Particularity

Plaintiffs allege that Defendants' alleged pattern of unlawful racketeering activity consisted of multiple predicate acts of mail and wire fraud, in violation of 18 U.S.C. §§ 1341 & 1343. (Compl. ¶ 93). Because these predicate acts are founded on allegations of fraud, Plaintiffs must satisfy the heightened pleading standards of Rule 9(b). *See Tel-Phonic*, 975 F.2d at 1138; *Walsh*, 195 F.Supp.2d at 846. Rule 9(b) requires Plaintiffs to plead the "circumstances constituting fraud with particularity." FED. R. CIV. P. 9(b). "At a minimum, Rule 9(b) requires allegations of the particulars of 'time, place, and contents of the false representations, as well as the identity of the person making the misrepresentations and what he obtained thereby.'" *Tel-Phonic*, 975F.2d at 1139 (quoting 5C CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE, at § 1297 (1990)).

"In the civil RICO context, Rule 9(b) also requires the plaintiff to allege specifically how *each* act of mail or wire fraud furthered the fraudulent scheme, who caused what to be mailed or wired

when, and how the mailing or wiring furthered the fraudulent scheme." *FMC Int'l A.G. v. ABB Lummus Global, Inc.*, 2006 WL 213948, at *4 (S.D. Tex. Jan. 25, 2006) (emphasis in original) (citing *Heden v. Hill*, 937 F.Supp. 1230, 1243 (S.D. Tex. 1996)). Moreover, Plaintiffs' allegations must "inform each defendant of the nature of his alleged participation in the fraud." *DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2 Cir. 1987). In other words, Plaintiffs cannot simply "attribute vaguely the alleged fraudulent activity to the 'defendants' collectively." *FMC Int'l*, 2006 WL 213948, at *4 (citing *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2 Cir. 1993)). Finally, Plaintiffs must plead reliance on the predicate acts in order to show proximate cause under RICO. *See Summit Props. Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 558-59 (5 Cir. 2000); *see also Old Time Enters., Inc. v. Int'l Colony Corp.*, 862 F.2d 1213, 1218 (5 Cir. 1989) ("[A] proximate causal relation must exist between the RICO predicate acts and the plaintiff's damages.").

Defendants claim that Plaintiffs fail to allege specific violations of the mail or wire fraud statutes by any defendant and that Plaintiffs also fail to allege who made the purported representations, when and where they were made, the contents of the representations or what the Defendants obtained by the representations. Defendants also complain that Plaintiffs merely allege that "Defendants" generally committed the predicate acts without identifying which defendant committed each act. The Court finds that, with respect to each of the predicate acts identified, Plaintiffs have failed to specifically allege 1) which Defendant committed the described acts; 2)

what that particular Defendant obtained thereby; 3) how each predicate act furthered the fraudulent scheme; and 4) how Plaintiffs relied on each predicate act to their detriment.

Just by way of example, in paragraph 71 (e) of the complaint, Plaintiffs allege that Defendants caused newsletters to be mailed in January, April, July, and October of each year since 1998 and that many if not all of these newsletters "contain deceptive and fraudulent information and promotional statements" without detailing the time, place, and content of the allegedly fraudulent statements or which particular defendant was responsible for making them. Plaintiffs also list various purported examples of misleading statements contained in the WIN newsletters (*see* Compl. ¶¶ 71(e)-(h)), yet they fail to specify how their reliance on any of the predicate acts set forth caused their injuries. For instance, Plaintiffs state that the WIN newsletter for fourth quarter 2000 deceptively portrayed Khan as a "Monthly Top Producer" for June 2000 despite the fact that he only became a WIN distributor in the same month and never earned any profit in June 2000. (Compl. § 71(e)). While this communication might well be misleading or deceptive, Plaintiffs have failed to plead how Khan or any other Plaintiff relied on the communication to their detriment; it appears, for example, that Khan at least had already made a substantial investment in WIN by the time the statement was ever published. (*Id.*).

Citing to *Corley v. Rosewood Care Center, Inc.*, 142 F.3d 1041, 1051 (7 Cir. 1998), Plaintiffs suggest

that Rule 9(b)'s requirements "can be relaxed in cases such as the one at bar." (Pls.' Resp. at 18). But *Corley* simply recognized that the particularity requirement of Rule 9(b) can be eased in certain situations where the plaintiff lacks access to all facts necessary to set forth his claim. *Corley*, 142 F.3d at 1051. The complaint at issue in *Corley* specifically emphasized that specific information, such as the time or place a communication was made, and the identity of those to whom the communications were directed, was peculiarly within the knowledge of the defendants. *Id.* Plaintiffs make no such allegation here, either in their complaint or in their briefing.

2. *Plaintiffs Have Failed to State a Claim Under RICO*

a. 18 U.S.C. § 1962(a)

The Fifth Circuit has held that § 1962(a) must be read in conjunction with RICO's civil remedies provision – § 1964(c) – which creates a civil right of action for "[a]ny person injured in his business or property by reason of a violation of section 1962[.]" *Nolen v. Nucentrix Broadband Networks Inc.*, 293 F.3d 926, 929 (5 Cir. 2002). The plaintiff's injury must directly arise from the violation of the RICO section at issue. *Id.* With respect to § 1962(a), a plaintiff must allege "that its injury flows from the use or investment of racketeering proceeds, rather than from the underlying predicate racketeering acts." In re *Sunpoint Sec., Inc.*, 350 B.R. 741, 747 (Bankr. E.D. Tex. 2006). Here, Plaintiffs merely allege in conclusory fashion that each of the Defendants used or invested "income derived from the pattern of unlawful activity to operate, maintain control of and maintain an interest in the unlawful enterprises" and that "[a]s a direct and proximate result of said unlawful conduct", Plaintiffs were defrauded of over $215,800. (Compl. ¶¶ 94, 97). In essence, Plaintiffs merely recite the elements of the statute and claim that they suffered damages as a result. Such conclusory allegations are insufficient to state a § 1962(a) claim. *See Abraham v. Singh*, – F.3d –, 2007 WL 575833, at *4 (5 Cir. Feb. 26, 2007).

b. 18 U.S.C. § 1962(b)

To recover under § 1962(b), "a plaintiff must show that his injuries were proximately caused by a RICO person gaining an interest in, or control of, the enterprise through a pattern of racketeering activity." *Crowe v. Henry*, 43 F.3d 198, 205 (5 Cir. 1995). Plaintiffs have again stated their claim in a conclusory way, merely alleging that "[t]hrough the pattern of racketeering activity alleged herein, the defendants have acquired and/or maintained, directly or indirectly, an interest and/or control of the unlawful enterprises[.]" (Compl. ¶ 99). The complaint sets forth no facts showing any sort of causal connection between their injuries and a Defendant's acquisition and/or maintenance and/or interest in the described enterprises. Lacking such facts, Plaintiffs' § 1962(b) claim must be dismissed. *See Abraham*, 2007 WL 575833, at *5.

c. 18 U.S.C. § 1962(c)

Section 1962(c) makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity[.]" Plaintiffs assert that each of the Defendants are RICO "persons", and they assert two enterprises: (1) WIN itself; and (2) an association-in-fact enterprise consisting of all Defendants. (Compl. ¶¶ 91-91). Under § 1962(c), the RICO "person" and the RICO "enterprise" must be distinct. *See Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001); *St. Paul*, 224 F.3d at 445. This required distinction is based on a textual reading of § 1962(c), which speaks of "person[s] who are 'employed by or associated with'

the 'enterprise.'" *Cedric Kushner*, 533 U.S. at 161. One can only employ, be employed by, or associate with others, "not oneself." *Id.*; *Bishop v. Corbitt Marine Ways, Inc.*, 802 F.2d 122, 122 (5 Cir. 1986). WIN thus cannot be a valid enterprise because WIN is also named as a RICO person.

A RICO person's membership in an association-in-fact enterprise does not violate the person/enterprise distinction. *See St. Paul*, 224 F.3d at 447. However, "[t]he fact that officers or employees of a corporation, in the course of their employment, associate to commit predicate acts does not establish an association-in-fact enterprise distinct from the corporation." *Elliot v. Foufas*, 867 F.2d 877, 881 (5 Cir. 1989); *Whelan v. Winchester Prod. Co.*, 319 F.3d 225, 229 (5 Cir. 2003) ("It is not enough to establish that a defendant corporation through its agents committed the predicate acts in the conduct of its own business."); *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 441 (5 Cir. 1987) (concluding that bank, holding company, and three bank employees did not exist separately apart from the bank); *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2 Cir. 1994) ("[B]y alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant, the distinctness requirement may not be circumvented."). Although each these cases involved corporations, the Court perceives of no reason why the same principle should not apply to partnerships. *See Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union Local Union* 639, 883 F.2d 132, 141 (D.C. Cir. 1989), *modified on other*

grounds, 913 F.2d 948 (D.C. Cir. 1990) ("[W]hile the corporate or *organizational* defendant may itself be a member of the enterprise association, the member[s] of the enterprise association may not simply be subdivisions, agents, or members of the defendant organization.") (emphasis added). Here Plaintiffs simply allege that the association enterprise consists of WIN itself, its general partner (WINNI), WINNI's officers (Ralphand Cathy Oats), and a WIN employee (Matthews). (Compl ¶ 92). Because the purported members of the association enterprise are all constituent members of WIN, Plaintiffs have failed to plead the existence of an association-in-fact enterprise apart from WIN.

d. 18 U.S.C. § 1962(d)

In light of Plaintiffs' failure to state a claim for relief under § 1962(a)-(c), their § 1962(d) conspiracy claim must necessarily fail. *See Ashe v. Corley*, 992 F.2d 540, 544 (5 Cir. 1993); *Webster v. NY Life Ins. Co.*, 1998 WL 28261, at *6 (E.D. La. Jan. 16, 1998) ("Any claim under § 1962(d) based on conspiracy to violate the other subsections of section 1962 necessarily must fail if the substantive claims are themselves deficient.").

H. Limitations

Finally, Defendants argue that the operation of applicable statutes of limitation bar all of Plaintiffs' claims. The limitations periods that apply to Plaintiffs' claims range from two to four years. *See* TEX. BUS. & COM. CODE § 17.565 (DTPA – 2 years); *Connell v. Connell*, 889 S.W.2d 534, 541 (Tex.

App. – San Antonio 1994, writ denied) (civil conspiracy – 2 years); TEX. CIV. PRAC. & REM. CODE § 16.004(a)(4) (fraud – 4 years); *Rotella v. Wood*, 528 U.S. 549, 553 (2000) (civil RICO – 4 years). Defendants assert that Plaintiffs' allegations with respect to all of their claims center around conduct occurring, at latest, in January 2001. Because Plaintiffs did not file this suit until July 8, 2005, Defendants contend that all of Plaintiffs' claims are time-barred. Plaintiffs argue that their claims are rescued by the Texas Savings Clause ("Savings Clause"), which provides as follows:

> (a) The period between the date of filing an action in a trial court and the date of a second filing of the same action in a different court suspends the running of the applicable statute of limitations for the period if:
>
> > (1) because of lack of jurisdiction in the trial court where the action was first filed, the action is dismissed or the judgment is set aside or annulled in a direct proceeding; and
> >
> > (2) not later than the 60 day after the date the dismissal or other disposition becomes final, the action is commenced in a court of proper jurisdiction.
>
> (b) This section does not apply if the adverse party has shown in abatement that the first filing was made with intentional disregard of proper jurisdiction.

TEX. CIV. PRAC. & REM. CODE § 16.064.

Plaintiffs claim that the Savings Clause applies because this suit was filed within 60 days after the Illinois court dismissed their earlier consolidated case based on a provision in their distributorship contracts making jurisdiction and venue mandatory in Dallas County. Defendants counter that the Savings Clause does not apply for four reasons. First, they claim that the clause does not apply to Plaintiffs' claims based on the Texas DTPA because Plaintiffs never asserted Texas claims in the Illinois court. Plaintiffs did, however, assert claims under the Illinois Consumer Fraud Act ("ICFA") in Illinois. The question is whether, under the Savings Clause, Plaintiffs' filing of the ICFA claims in the Illinois action stands as a proxy for their DTPA claims brought in Texas. The Court believes that the parties' briefing inadequately addresses the issue, so it will not decide the issue at this time. Defendants may raise their limitations arguments again on summary judgment.

Second, Defendants maintain that the Savings Clause cannot save Plaintiffs' RICO claim from the limitations bar because a state savings clause cannot be used to extend a federal limitations period. Because the Court has found that Plaintiffs' RICO claims should be dismissed it need not address Defendants' limitation argument with respect to those claims.

Third, Defendants contend that "an action in one state does not toll the running of the statute of limitations against action in another state." The

Fifth Circuit rejected the same argument when it was advanced by the defendant in *Long Island Trust Co. v. Dicker*, 659 F.2d 641, 647 (5 Cir. 1981) ("[W]e believe that the Texas courts would apply [the Savings Clause] to a suit which . . . was dismissed for want of jurisdiction in the court of a sister state and has been refiled within sixty days thereafter in a court of proper jurisdiction."). It is true, as Defendants point out, that the *Long Island Trust* Court applied § 16.064's predecessor statute – article 5539a of the Texas Revised Civil Statutes; yet Defendants fail to explain how the two statutes are in any way substantively different from each other such to make the holding of *Long Island Trust* inapplicable to § 16.064. Both statutes toll the running of the applicable statute of limitations between the date of the filing a first and second action if the first action was dismissed because of lack of jurisdiction in the "trial court" and the second action is commenced in a court of proper jurisdiction within 60 days of the dismissal. The Fifth Circuit explained that under its terms the "statute does not refer to dismissal from 'a Trial Court of this jurisdiction'; it simply says 'Trial Court.'" *Id.* at 646.

Finally, Defendants contend that § 16.064 does not apply because Plaintiffs filed their suit in Illinois "with intentional disregard of proper jurisdiction." Defendants claim that Plaintiffs were "clearly aware of the terms of their agreements with Wellness, which unequivocally required lawsuits to be filed in Dallas, Texas." (Defs.' Mot. at 25). It can certainly be said that the associate and distributorship agreements Plaintiffs signed contained language unequivocally fixing venue and jurisdiction in Dallas

County. However, those agreements expressly incorporated the WIN Rules and Regulations, which required each distributor to unconditionally submit themselves to the "nonexclusive jurisdiction" of a Dallas court. It is not entirely implausible that Plaintiffs, in filing suit in Illinois, had a good faith, but ultimately mistaken, belief that doing so was proper because the WIN rules said that jurisdiction in Texas was "nonexclusive". The Court makes no judgment at this stage as to whether Plaintiffs had such a good faith belief; however, the Court cannot say as a matter of law that Plaintiffs can prove no set of facts showing that they did.

III. Conclusion

For the reasons set forth above, the Court GRANTS Defendants' motion to dismiss in part and DENIES it in part. The Court DISMISSES with prejudice Plaintiffs' claims against Defendant Sherri Matthews for failure to state a claim. The Court DISMISSES without prejudice Plaintiffs' claims against Defendant Cathy Oats for failure to meet the heightened pleading requirements of Rule 9(b). The Court DISMISSES without prejudice Plaintiffs' claims against Defendant Ralph Oats, except as otherwise noted in this order, for failure to meet the heightened pleading requirements of Rule 9(b). The Court DISMISSES without prejudice Plaintiffs' RICO claims in their entirety for failure to meet the heightened pleading requirements of Rule 9(b) and for failure to state a claim. In all other respects, Defendants' motion to dismiss is DENIED. The Court will allow Plaintiffs 15 days from the date of this order to, consistent with Rule 11 of the federal

rules, file an amended complaint if they so choose in compliance with the particularity requirements of Rule 9(b) and Fifth Circuit case law and the requirements necessary to state a valid RICO claim. Plaintiffs will **not** be permitted to add any new substantive claims, and no extensions of the re-pleading deadline will be granted. Should Plaintiffs elect not to file an amended complaint, the foregoing claims dismissed without prejudice will be dismissed with prejudice.[4]

SO ORDERED.

SIGNED May 9th, 2007

JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

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[4] Nothing in this order affects this Court's May 7, 2007 order overruling Plaintiffs' objections to the Magistrate Judge's order of April 12, 2007 or the Court's May 8, 2007 order denying Plaintiffs' motion for a continuance.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICHARD SHARIF, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**No. 3:05-CV-1367-B**
	§	**ECF**
WELLNESS INT'L	§	
NETWORK, LTD a/k/a WIN,	§	
et al.,	§	
	§	
Defendants.	§	

MEMORANDUM ORDER

Before the Court are: 1) Defendants' Partial Motion to Dismiss Plaintiffs' First Amended Complaint (doc. 83); and 2) Defendants' Motion for Summary Judgment (doc. 85). For the reasons that follow, the Court GRANTS Defendants' motion for summary judgment in its entirety. The Court therefore need not address the issues presented by Defendants' motion to dismiss.

I. Background

This suit arises from distributorship contracts that Plaintiffs signed with Wellness International Network, Ltd. ("WIN" or "Wellness"), an entity which purports to be a multi-level marketing operation that sells and distributes health and wellness products. (Pls. First Am. Compl. ¶ 12). According to Plaintiffs,

WIN's founder, Ralph Oats, and his wife Cathy hosted seminars around the country promising riches to those who would become distributors of Wellness products. (*Id.* at ¶¶13-31). Plaintiffs claim that Ralph Oats told them that the more money they invested in the Wellness system, the more they stood to gain. (*Id.* at ¶ 15). Enticed by the promises made by the Oatses and other statements made in various pieces of WIN literature, each of the Plaintiffs signed distributorship contracts with WIN and invested substantial sums of money in inventory purchases.

Plaintiffs complain that only after they made their investments did they learn that WIN is really nothing more than a classic, and illegal, pyramid scheme. They claim that under the WIN system compensation is primarily based on a distributor's introduction of new recruits into the scheme as opposed to the actual sale of health products marketed by the company. (*Id.* at ¶ 42). Plaintiffs allege that they lost their entire investments – totaling over $995,000. (*Id.* at ¶ 62).

In April 2002 Plaintiff Richard Sharif and his wife filed suit against the WIN Defendants and others in the United States District Court for the Northern District of Illinois, alleging violations of Racketeer Influenced and Corrupt Organizations Act ("RICO"). They later filed an amended complaint adding claims for violations of federal securities laws, the Illinois Consumer Fraud Act, fraud, and civil conspiracy, among others. In August 2002, Plaintiffs Waqar and Shafqut Khan (the "Khans") and Plaintiffs Abdul and Shaheen Rashid (the "Rashids") brought a separate suit against the WIN

Defendants in the Northern District of Illinois asserting the same claims as the Sharifs. The two actions were consolidated, and the Illinois district court ultimately dismissed the case without prejudice on December 2, 2004 pursuant to forum selection clauses contained in the distributorship agreements Plaintiffs signed mandating that jurisdiction and venue over any disputes arising out of the agreements be litigated in Dallas County, Texas. Plaintiffs appealed the ruling to the Seventh Circuit.

While the appeal was pending, on July 8, 2005, Plaintiffs filed the instant case against the Wellness Defendants in this Court, asserting violations of the Texas Deceptive Trade Practices Act ("DTPA") and RICO and common law claims for fraud and civil conspiracy. Upon motion of the parties the Court stayed the case pending the Seventh Circuit's resolution of the Illinois appeal. On February 17, 2006, the Seventh Circuit affirmed the district court's ruling that the proper forum for the action was in Dallas County. After the parties notified this Court of the Seventh Circuit's decision, the Court lifted the stay in this case on July 27, 2006.

On August 9, 2005, Defendants filed a motion to dismiss Plaintiffs' claims against them under Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure. On May 9, 2007, the Court granted the motion in part and denied it in part. In short, the Court: dismissed Plaintiffs' claims against Defendant Sherri Matthews with prejudice for failure to state a claim; dismissed most of the claims against Ralph Oats without prejudice for failure to meet the

heightened pleading requirements of Rule 9(b); and dismissed all of Plaintiffs' RICO claims without prejudice for failure to comply with Rule 9(b) and for failure to state a claim. The Court allowed Plaintiffs 15 days to file an amended complaint curing the deficiencies identified in the Court's memorandum order.

Before proceeding further, a few words must be said about Plaintiffs' startling want of zeal in prosecuting this action. Defendants claim (and Plaintiffs have never refuted) that Plaintiffs have never: served initial disclosures, propounded any written discovery, requested any depositions, or designated any experts. Nor have Plaintiffs been responsive to Defendants' discovery requests. On November 20, 2006, Defendants served each of the Plaintiffs with requests for admissions along with a number of other types of requests. The requests went unanswered. Defendants thus took the position that all of the requests for admissions they had propounded had been deemed admitted under Rule 36(a). On March 22, 2007, Plaintiffs moved to vacate the deemed admissions. The Court referred the motion to Magistrate Judge Paul Stickney, and on April 12, 2007, Magistrate Judge Stickney entered an order denying the motion to vacate on the ground that Plaintiffs failed to show that the withdrawal of the admissions would serve the presentation of the case on the merits and would not prejudice the Defendants. Plaintiffs filed objections to the Magistrate Judge's ruling, which this Court overruled in a May 7, 2007 memorandum order. The requests for admissions served upon Plaintiffs on

November 20, 2006 have thus been conclusively deemed admitted.

On May 24, 2007, Plaintiffs filed their First Amended Complaint in which two causes of action are asserted: 1) DTPA violations and 2) violations of RICO under 18 U.S.C. § 1962(a)-(c). On June 5, 2007, Defendants filed a partial motion to dismiss Plaintiffs' RICO claims. On June 11, 2007, Defendants filed a motion seeking summary judgment on all of Plaintiffs' extant claims in this case. Plaintiffs have filed responses to both motions.

As the issues raised by Defendants' motion for summary judgment prove dispositive of all claims, the Court focuses its attention on that motion. Defendants claim entitlement to summary judgment on the following grounds: 1) Plaintiffs' deemed admissions negate one or more material elements of each of their claims; 2) the applicable statutes of limitations bar all of Plaintiffs' claims; 3) Plaintiffs can put forward no evidence in support of their claims; and 4) Plaintiffs' failure to serve initial disclosures bars them from offering any evidence or witnesses at trial. In this order the Court will address the first and third grounds.

II. Analysis

A. Summary Judgment Legal Standard

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate when the pleadings and record evidence show that no genuine issue of material fact exists and that the

movant is entitled to judgment as a matter of law. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5 Cir. 1994). "[T]he substantive law will identify which facts are material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Only disputes about material facts will preclude the granting of summary judgment. *Id.*

The burden is on the summary judgment movant to prove that no genuine issue of material fact exists. *Latimer v. Smithkline & French Lab.*, 919 F.2d 301, 303 (5 Cir. 1990). If the non-movant bears the burden of proof at trial, the summary judgment movant need not support its motion with evidence negating the non-movant's case. Rather, the movant may satisfy its burden by pointing to the absence of evidence to support the non-movant's case. *Id.*; *Little*, 37 F.3d at 1075.

Once the movant has met its burden, the non-movant must show that summary judgment is not appropriate. *Little*, 37 F.3d at 1075 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). "This burden is not satisfied with 'some metaphysical doubt as to material facts,' . . . by 'conclusory allegations,' . . . by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence." *Id.* (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)). The non-moving party must "come forward with 'specific facts showing that there is a *genuine issue for trial.*'" *Matsushita*, 475 U.S. at 587 (emphasis in original) (quoting FED. R. CIV. P. 56(e)). To determine whether a genuine issue exists for trial, the court must view all of the evidence in the light most favorable to the nonmovant, and the

evidence must be sufficient such that a reasonable jury could return a verdict for the non-movant. *Munoz v. Orr*, 200 F.3d 291, 302 (5 Cir. 2000); *Anderson*, 477 U.S. at 248.

B. Deemed Admissions

Defendants first move for summary judgment on the basis that Plaintiffs' deemed admissions negate all of their liability allegations. "Rule 36 allows litigants to request admissions as to a broad range of matters, including ultimate facts, as well as applications of law to fact." In re *Carney*, 258 F.3d 415, 419 (5 Cir. 2001). Any matter deemed admitted under the rule is conclusively established unless the court allows the admissions to be withdrawn. FED. R. CIV. P. 36(b). Rule 56(c) expressly provides that admissions on file may serve as a basis for summary judgment. FED. R. CIV. P. 56(c). A party's failure to respond to requests for admissions dealing with essential issues leaves that party peculiarly vulnerable to summary judgment. *See Hill v. Breazeale*, 197 Fed. Appx. 331, 336, 2006 WL 2528346 (5 Cir. Sept. 1, 2006) (citing *Dukes v. S. Carolina Ins. Co.*, 770 F.2d 545, 548-49 (5 Cir. 1985)). While the Fifth Circuit has recognized the "potential harshness" involved when defaulted admissions are case-dispositive, it has at the same time emphasized that compliance with procedural rules is "necessary to insure the orderly disposition of cases." *Carney*, 258 F.3d at 421 (quoting *United States v. Kasuboski*, 834 F.2d 1345 (7 Cir. 1987)).

In their response to Defendants' summary judgment motion Plaintiffs admit that "it is impossible for the Plaintiffs to overcome Defendants' motion for summary judgment based upon the defaulted admissions being deemed admitted." (Pls. Resp. 3). This is a fair concession. Section 17.461 of the DTPA makes it a state jail felony offense if a

person "contrives, prepares, establishes, operates, advertises, sells, or promotes a pyramid promotional scheme." TEX. BUS. & COM. CODE § 17.461(c). Section 17.50(a)(1)(A) in turn provides that a consumer may maintain an action when a person engages in a false, misleading, or deceptive act or practice that is listed in § 17.46(b). Section 17.46's "laundry list" of "false, misleading, or deceptive acts or practices" includes "promoting a pyramid promotional scheme, as defined by Section 17.461." TEX. BUS. & COM. CODE § 17.46 (b)(21). The DTPA defines a "pyramid promotional scheme" as a "plan or operation by which a person gives consideration for the opportunity to receive compensation that is derived primarily from a person's introduction of other persons to participate in the plan or operation rather than from the sale of a product by a person introduced into the plan or operation." TEX. BUS. & COM. CODE § 17.461(a)(6).

Plaintiffs have conclusively admitted, among other things, that:

- WIN is not a "promotional pyramid scheme", a "classic pyramid scheme", or any kind of "pyramid scheme" (Defs. App. 19, 59, 92).

- WIN complies with all state and federal laws governing multilevel marketing companies. (*Id.* at 19, 59, 92).

- The WIN Defendants do not give any consideration for the opportunity to receive compensation that is derived

primarily from a person's introduction of other persons to participate in WIN rather than from the sale of a product by a person introduced to WIN. (*Id.* at 20-21, 60-61, 93-94).

- WIN's commissions, bonuses, and overrides are based solely on the sales of product. (*Id.* at 20, 60, 93).

- WIN pays nothing to an independent distributor for the recruitment of a distributor. (*Id.* at 20, 60, 93).

- Plaintiffs made retail sales of WIN product inventory. (*Id.* at 15-16, 56-57, 89-90).

- Plaintiffs have sustained no damages in this action. (*Id.* at 32, 71, 104).

Based on these admissions, Plaintiffs are simply unable to establish that any of the WIN Defendants promoted a pyramid promotional scheme within the meaning of the DTPA. Accordingly, Defendants are entitled to summary judgment on Plaintiffs' cause of action under the DTPA.

To establish a RICO claim under 18 U.S.C. § 1962(a)-(c), a plaintiff must show that (1) a person engages in (2) a pattern of racketeering activity that is (3) connected to the acquisition, establishment, conduct, or control of an enterprise. *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 439 (5 Cir. 2000). A "person" under RICO is the defendant that

committed the RICO violation and can be "any individual or entity capable of holding a legal or beneficial interest in property." 18 U.S.C. § 1961(3); *St. Paul*, 224 F.3d at 440. "Racketeering activity" includes certain state and federal offenses listed in § 1961(1). *Kwan-Tai Corp. v. Mastercraft Printers, Inc.*, 2001 WL 487329, at *4 (E.D. La. May 7, 2001). The individual acts of racketeering are commonly described as the "predicate" acts or offenses. *Id.* An "enterprise" is broadly defined by the act, and it "can be either a legal entity or an association-in-fact." 18 U.S.C. § 1961(4); *St. Paul*, 224 F.3d at 440. There is no RICO liability if the plaintiff did not suffer damages as a result of the predicate acts. *See* 18 U.S.C. § 1964(c); *McCaleb v. A.O. Smith Corp.*, 200 F.3d 747, 752 (11 Cir. 2000); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1320 (2 Cir. 1990).

Plaintiffs admit, among other things, that:

- Defendants did not commit a single RICO predicate act. (Defs. App. 30-31, 70, 102-03).

- WIN is not an enterprise within the meaning of 18 U.S.C. § 1961(4). (*Id.* at 32, 71, 104).

- Defendants are not part of an association-in-fact enterprise within the meaning of 18 U.S.C. § 1961(4). (*Id.* at 32-33, 71-72, 104-05).

- No defendant engaged in mail or wire fraud in violation of 18 U.S.C. § 1341 or § 1343. (*Id.* at 33, 72, 105).

- None of the Defendants have conspired to violate 18 U.S.C. § 1962. (*Id.* at 33, 73, 105).

- No defendant made any misrepresentation of material fact to Plaintiffs. (*Id.* at 34, 73, 106).

- Plaintiffs have sustained no damages in this action. (*Id.* at 32, 71, 104).

These admissions conclusively negate one or more elements of Plaintiffs' cause of action under RICO. Defendants are accordingly entitled to summary judgment on Plaintiffs' RICO claim.

C. No Evidence

Defendants also move for summary judgment on no-evidence grounds. As stated by the Fifth Circuit:

> On summary judgment, the moving party is not required to negate the nonmoving party's claims or present evidence proving the absence of a material fact issue; rather, the moving party may meet its burden by simply "pointing to an absence of evidence to support the nonmoving party's case." Once the moving party files a properly supported motion for summary judgment, the burden then shifts to the non-moving party to "set forth specific

> facts showing that there is a genuine issue for trial." *Summary judgment will be granted* where the nonmovant is unable to point to any evidence in the record that would sustain a finding in the nonmovant's favor on any issue on which he bears the burden of proof at trial.

Le v. Cheesecake Factory Rests. Inc., 2007 WL 715260, at *4 (5 Cir. March 6, 2007) (citations omitted) (emphasis added). Here, in the face of Defendants' no-evidence challenge, Plaintiffs have failed to point to any evidence that would support a finding in their favor at trial. Plaintiffs have thus failed to meet their burden of showing that there are genuine issues for trial. Defendants are entitled to summary judgment on Plaintiffs' claims.

III. Conclusion

For the reasons set forth above, the Court GRANTS Defendants' motion for summary judgment in its entirety. The Court will separately issue a judgment.

SO ORDERED.

SIGNED July 16th, 2007

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JANE J. BOYLE
UNITED STATES DISTRICT JUDGE